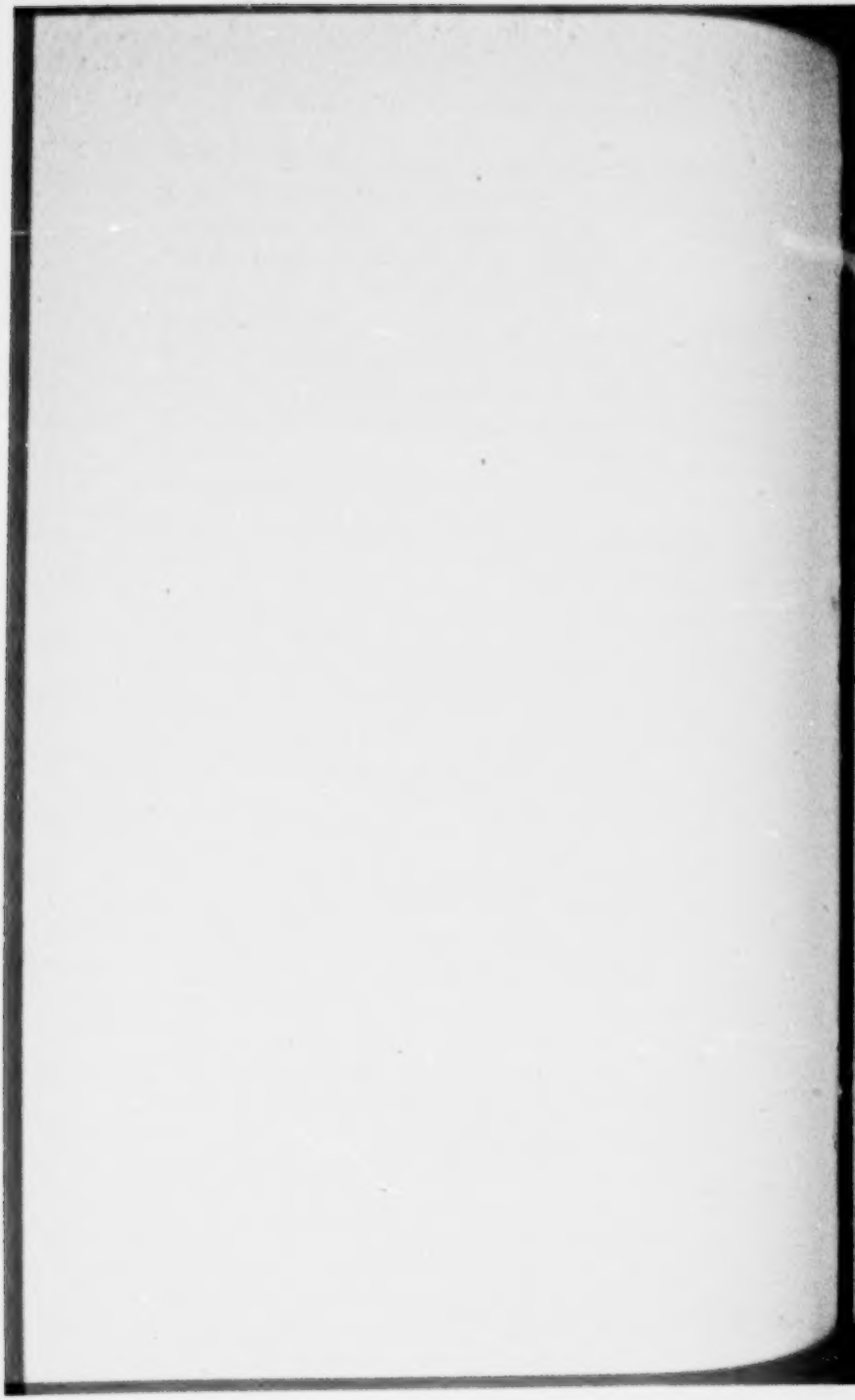

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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM 1904

THE CITY OF OKLAHOMA CITY,
Plaintiff in Error,
vs.
FRANK McMASTER,
Defendant in Error.

No. 137

Appeal from the Supreme Court of the Territory of Oklahoma.

BRIEF OF APPELLANT.

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STATEMENT OF FACTS.

This case was begun in the District Court of Oklahoma County, Oklahoma Territory, by Frank McMaster, defendant in error, as plaintiff, against the City of Oklahoma City plaintiff in error, as defendant, and is an action in ejectment to recover a piece of ground fifty feet in width, and one hundred forty feet in length, described by metes and bounds, as commencing at a point in said City at the Southeast cor-

ner of Block twenty-three (23) as shown by the Trustees' plat thereof, and which ground lies in and is a part of a street designated as Grand Avenue in the City of Oklahoma City. (Answer in court's opinion, page 60 of record, with plat following page 38, and findings of fact pages 68, 36 and 37.) Plaintiff's petition also prayed damages for the retention of the ground. Demurrer was presented to this petition, and overruled. (Opinion page 60.) The defendant then answered by general denial, and by separate defense, stating that the land involved is in Grand Avenue, of said city as appears on the original plat and survey of said City of Oklahoma City, approved by the Board of Townsite Trustees, Number Two, on the 6th day of September, 1890, and duly recorded. (Page 60). A reply of general denial was filed to this answer, denying the averments of the answer, which contradicted the averments of the petition but not denying the allegations of new matter in the answer. (Page 62). Trial was had before the court and evidence offered. (Pages 62-63). Upon the issue as to the plaintiff's title, plaintiff produced in evidence patent issued by the President of the United States on the first day of October 1890, to Edgar N. Sweet, Levi E. Coe, and David H. Hammons, trustees of the townsite of Oklahoma City, in trust for the several use and benefit of the occupants of said townsite of Oklahoma City, under act of Congress of May 14, 1890, for the southeast quarter of section thirty-three (33) in township twelve (12) north, of range three (3) west of the Indian Meridian, in Oklahoma Territory, containing one hundred and sixty (160) acres; (pp. 35-62-68), also, certain findings of fact made by John H. Burford, Judge, in an action pending in the District Court of Canadian County, Oklahoma Territory, by Frank McMaster vs. The said Townsite Trustees. These findings were with reference to the settlement, occupancy, etc., of Frank McMaster, and will be more specifically referred to in the argument (pp. 36, 37, 62 and 68). Also, a certain order made by Judge Bur-

ford while holding court in Kingfisher County, Oklahoma Territory, but made in the case of Frank McMaster vs. The Townsite Trustees, pending in the District Court of Canadian County, said order being that the trustees make and issue a deed to Frank McMaster for the tract of land sued for. (See pp. 38-62.) The defendant demurred to this evidence, (pp. 29–62), which demurrer was overruled and excepted to, (pp. 30–62). Defendant then produced in evidence the final receipt of John H. Burford, Register of the United States Land Office at Oklahoma City, Oklahoma Territory, on which the patent produced by plaintiff was issued. (pp. 39–63.) Also the plat of the townsite of Oklahoma City, approved by Edgar N. Sweet, Levi E. Coe, and David H. Hammons, trustees of said townsite, the same consisting of the southeast quarter of section thirty-three (33), in township twelve (12) north, of range three (3) west, of the Indian Meridian in Oklahoma County, Oklahoma Territory, in September, 1890, and which plat was approved as strictly conformable to the said survey and according to the Act of Congress approved May 14th, 1890. That said plat was filed for record in the office of the County Clerk, who was, under the Nebraska law then in force in Oklahoma, Register of Deeds for the county on September 8th, 1890. (See plat, following page 38, referred to in the Court's statement of facts. Pp. 63–68). The defendant then rested. (p. 63.) The plaintiff then offered in rebuttal certain proceedings with reference to the incorporation of the village of Oklahoma City (pp. 40 to 47), which is of no importance to the questions we present.

The trial court on July 7th, 1900, rendered judgment for the plaintiff and against the defendant Oklahoma City for the recovery of this piece of ground and damages of $250 per year for three years next preceding the commencement of the action, to which the defendant excepted, and upon request of the defendant, by notice upon the journal of the Court demanding a second trial of said cause, as provided

by statute in ejectment, granted a second trial. and the judgment then rendered was by the court set aside and vacated and the order granting a second trial made, and the cause continued until the next term of court. (pp. 48–63.) Afterward, the plaintiff filed a motion to set aside the Court's order and decree granting a second trial (pp. 49, 50–63), and on the 29th day of April, 1901, plaintiff's motion to reinstate the judgment rendered in his favor on July 7, 1900, was sustained (pp. 51–63). On the same day the defendant, the city of Oklahoma City, filed its motion for a new trial (pp. 51–63) and on June 1st, 1901, this motion for a new trial was overruled, defendant excepting (p. 52–63) and appeal granted to the Supreme Court. On August 5th, 1901, the city of Oklahoma City filed its appeal from said judgment in the Supreme Court of the Territory of Oklahoma, and on June 6th, 1903, the judgment of the trial court was affirmed by the Supreme Court of Oklahoma (p. 58). Appeal has been taken from the judgment of the Supreme Court of Oklahoma to this Court. and the transcript with assignments of error were lodged in this Court on November 6th, 1903.

ASSIGNMENTS OF ERROR.

Among the errors set forth in the assignments of error by plaintiff in error, are the following, upon which we rely:

First: The Supreme Court of the Territory of Oklahoma erred in holding and deciding as a matter of law that appellant, plaintiff in error here, and plaintiff in error in the Supreme Court of the Territory of Oklahoma, had waived and abandoned the assignments of error made in the Supreme Court of the Territory of Oklahoma, and embraced within the first and second assignments of error as stated in the opinion of the Supreme Court of Oklahoma Territory in reciting that plaintiff in error had

abandoned certain assignments of error, including the assignment of error that the District Court had erred in setting aside the order and decree of the Court made granting a new and second trial as a matter of course in said ejectment suit, as provided by the laws of Oklahoma Territory.

Second: The Supreme Court of the Territory of Oklahoma erred in affirming the judgment of the District Court setting aside that part of the decree and order of the court granting a new and second trial as a matter of right in said ejectment case, and in reinstating said judgment of the plaintiff.

Third: The Supreme Court of the Territory of Oklahoma erred in affirming the judgment of the trial court in reinstating the judgment against the appellant, plaintiff in error, upon the motion of defendant in error, after said judgment had been by its own provisions set aside and vacated, as provided in said judgment, and said cause continued for the term, and without any evidence being thereafter produced upon which to warrant the reinstating of said judgment, or to warrant the rendition of a judgment against said defendant.

Fourth: That the Supreme Court of the Territory of Oklahoma erred in affirming the judgment and ruling of the trial court in admitting in evidence against this plaintiff in error, and over its objections at the trial of said cause, a copy of certain findings made by the District Court in Canadian County, Oklahoma Territory, in a case wherein Frank McMaster was plaintiff and Edgar N. Sweet, Levi E. Coe and David H. Hammons, constituting the trustees of Board No. 2, of the City of Oklahoma City, were defendants and in admitting in evidence against this plaintiff in error and over its objections, a copy of a certain order and judgment rendered and entered in said cause of Frank McMaster vs. said townsite trustees by Judge John H. Burford, while hold-

ing court in Kingfisher county, Oklahoma Territory. (See said orders in brief and argument.)

Fifth: That said Supreme Court of the Territory of Oklahoma erred in holding as a matter of law that the findings of facts made by the District Court of Canadian County, in an action by said defendant in error, Frank McMaster against said Board of Townsite Trustees, Board No. 2, composed of Edgar N. Sweet, Levi E. Coe, and David H. Hammons, constituted a judgment and final conclusion of the District Court of Canadian County, and that said findings were competent evidence and conclusive in that court.

Sixth: That said Sepreme Court of the Territory of Oklahoma erred in holding that the Townsite Trustees of said Board of Trustees No. 2, assigned to townsites in Oklahoma, were subject to a suit by a land or lot claimant to recover any part of said trust lands, and in holding that a beneficiary of said trust could maintain an action against the trustees to determine his claim of title and enforce the same prior to the time that the said trustees had conveyed the title vested in them for a trust purpose.

Seventh: The Supreme Court of the Territory of Oklahoma erred in holding and deciding as a matter of law in this case that where a claim had been entered upon public lands which are opened to settlement, and a party had made settlement thereon for homestead purposes and has vested rights therein, such rights cannot be taken from him for public use except by due process of law, and the payment of just and reasonable compensation therefor, in this, that said principle of law is not applicable to this case, because the defendant did not claim any right to the property by virtue of settlement made under the homestead laws of the United States, but claimed a right thereto as a townsite occupant, and said Supreme Court of Oklahoma Territory erred in holding and deciding that the defendant in error had a vested

right in and to the land in controversy, under the facts in this case.

Eighth: The Supreme Court of the Territory of Oklahoma erred in holding, as a matter of law, that the plat made by said Board No. 2, of the Townsite Trustees platting the land patented to said Townsite Trustees for townsite purposes into lots, blocks, streets and alleys, did not vest the title to the streets so platted for public purposes in the public, and in holding that the plaintiff had property which was located in said street so platted and which was taken from plaintiff, defendant in error, without due process of law.

Ninth: That the Supreme Court of the Territory of Oklahoma erred in holding and deciding as a matter of law, that defendant in error, Frank McMaster, plaintiff in the trial court, had a vested interest in the land in controversy, and which was composed of parcels of land located in the streets of Oklahoma City, as shown and declared by the plat approved by the said Board of Townsite Trustees, constituted and appointed under Act of Congress of May 14th, 1890, governing townsites in Oklahoma Territory.

Tenth: That said Supreme Court of the Territory of Oklahoma erred in not holding, as a matter of law, that when the Board of Townsite Trustees, constituted and appointed under the Act of May 14th, 1890, governing townsites in Oklahoma, made and approved a plat of said townsite, all of the land so located in the streets as shown by the plat approved by said Trustees, was vested in the public for public uses and were devoted to public purposes as a public street and highway.

Eleventh: That said Supreme Court of the Territory of Oklahoma erred in holding, as a matter of law, that the defendant in error, plaintiff in the trial court, had a vested interest in the land in controversy, which land it appears was located in a street in the City of Oklahoma City when

the land was platted by the Trustees of said townsite, and the plat approved by said trustees, and in holding that a vested interest could be obtained in and to a part of said townsite, which, when the same was platted by the said townsite trustees, was shown to be in a street of said townsite.

Twelfth: That the said Supreme Court of the Territory of Oklahoma erred in holding as a matter of law that a person who was not in possession of a part of said townsite at the time the same was patented to the Townsite Trustees in trust for the use and benefit of the occupants thereof for townsite purposes, including the location of streets and alleys, had or could have a vested interest in said townsite, and particularly in a part of said townsite which had been by the occupants of said townsite prior to the patent thereof for the several use and benefit of the occupants thereof, devoted to the public use as a street.

Thirteenth: That the Supreme Court of the Territory of Oklahoma erred in affirming the judgment rendered in said cause in the District Court of Oklahoma County, Oklahoma Territory.

Fourteenth: That the Supreme Court of the Territory of Oklahoma erred in affirming the judgment of the District Court of Oklahoma County in overruling the motion of the plaintiff in error for a new and second trial therein.

Fifteenth: The Supreme Court of the Territory of Oklahoma erred in affirming the judgment of the District Court of Oklahoma County in said cause and in not ordering that judgment be rendered and entered for the City of Oklahoma City, plaintiff in error, and against Frank McMaster, defendant in error, upon the findings of fact and record in said cause.

BRIEF AND ARGUMENT.

First, Second, and Third Assignments of Error.

VACATION OF ORDER GRANTING SECOND TRIAL. RE-INSTATEMENT OF JUDGMENT, WITHOUT JURISDICTION.

Under these three assignments, we claim that there is manifest error in the action of the trial court, the District Court of Oklahoma County, Oklahoma Territory, and which was affirmed by the Supreme Court of Oklahoma, in vacating that part of the judgment in favor of McMaster and against the City of Oklahoma City which sustained defendant's demand for a second trial as a matter of right. The Supreme Court of Oklahoma stated but did not pass upon this question in its opinion (page 63 of record). We claim the right to have this question considered here, first, because it was mentioned in the brief of counsel then appearing for Oklahoma City (p. 80), and second; because even if not urged to the extent which the Supreme Court of Oklahoma might consider that it should have been, it came under the assignments of error that were presented in the petition in error to the Supreme Court of Oklahoma (p. 19). It was one of vital importance, and of substantive right, and also, is a jurisdictional question which this court may, and we think should consider, here.

This case is one in ejectment brought for the recovery of real property (see pages 21-59). It was tried to the court without the intervention of a jury, and judgment rendered in favor of plaintiff, McMaster, on July 7, 1900, (record pages 47-62). Immediately upon the rendition of the judgment, the plaintiff in error, against whom the judgment was rendered, by motion upon the journal of the court, demanded a second trial as a matter of right, which demand was granted and the judgment was set aside, and the case con-

tinued to the next term (pages 48-63). The order setting aside the judgment and granting a new trial, was a part of the judgment itself, all pronounced at the same time, and embraced in the same entry (pages 47-48).

Afterwards, and on January 21, 1901, McMaster filed a motion to set aside the order granting a new trial, and on February 11, 1901, he filed a second motion for the same purpose (pages 49, 50 and 63). On April 29, 1901, the court sustained said motion of McMaster's, and vacated the order granting a new trial, and re-instated the judgment, to which ruling of the court the plaintiff in error duly excepted (pages 51-63). This being an action for the recovery of real property, the plaintiff in error, against whom the judgment was rendered, was entitled to a second trial as of right. This is granted by the Statutes of Oklahoma. Section 4792, Wilson's Rev. Ann. Stat. (Civ. Code, Sec. 594) reads:

"In an action for the recovery of real property, the party against whom judgment is rendered, may, at any time during the term at which judgment is rendered, demand another trial by notice upon the journal, and thereupon the judgment shall be vacated, and the action stand for trial at the next term."

This statute is imperative. In a recent case, the Supreme Court of Oklahoma, construing this statute in the case of Keller vs. Hawk, 74 Pac. (Ok.) 106, 13, Ok., 261, says:

"There is no discretion vested in the court to grant or refuse the demand according to any equities or rights of the parties. If the action is for real property, either party, plaintff or defendant, against whom judgment is rendered, is entitled to another trial as a matter of right, if he makes the request in time and manner as required. It is the duty of the court, when the proper demand is made, and entered upon the journal, to vacate and set aside the judgment, and continue the cause until the next term."

This statute was adopted from the statutes of the State

of Kansas, in 1893, and prior to such adoption had received judicial construction by the Supreme Court of that State, and the rule as laid down in the case of Keller vs. Hawk, supra, has been the uniform holding of the Kansas Supreme Court.

Kennedy v. Haskill, 73 Pac. (Kas.) 913;
Doster v. Sterling, 33 Kas. 381, 6 Pac. 556.

The case at bar is squarely within the terms of the statute and when the demand for a second trial was made by the plaintiff in error, against whom the judgment was rendered, it was the imperative duty of the court to vacate such judgment.

It being clear that the trial court committed error, can the appellant properly urge such error in the Supreme Court of the United States? It may be urged by the defendant in error that in-as-much as the question was not argued in the brief of plaintiff in error which was filed in the Supreme Court of the Territory. that such error is waived and cannot be considered by the Supreme Court of the United States. We have examined the decisions of the Supreme Court of the United States, and find it to be the rule that the court will consider no questions not presented in the brief in the Supreme Court of the Territory, except such as are jurisdictional, or go to the right of the action.

It is our contention, however, that the error was sufficiently pointed out in the brief filed in the Supreme Court of the Territory to justify a review of the alleged error, (see page 80 of the record), and even if we are wrong in this respect, we insist that the error should be considered, because it involves a jurisdictional question which may be urged for the first time in the Supreme Court of the United States.

An examination of the record and briefs filed by the plaintiff in error in the Supreme Court of the Territory,

discloses that the ruling of the trial court in setting aside the order granting a new trial and re-instating the judgment, was duly excepted to by plaintiff in error at the time the ruling was made. This ruling was set out in the petition in error, and was urged as one of the grounds for a reversal of the judgment of the lower court. (Page 19). It was pointed out by the plaintiff in error in its brief filed for the consideration of the court (see page 80, of record brief of plaintiff in error.) This was sufficient to bring the error to the attention of the appellate court. It was sufficient to show that the point was not waived even if the attorneys who tried the case had the power to waive it on behalf of the municipality. The court had no right to presume that the point was abandoned merely because it was not argued in the brief. It was jurisdictional, and could not be waived in this manner, especially by the attorneys for the municipality. True, ordinarily as held in the decision appealed from, where errors are not insisted upon, and are not argued in the briefs, they will be deemed waived. But this is not, or should not be, an unbending rule. As pointed out by Judge Brewer, in the case of State vs. Stewart, 24, Kansas, 350, where the error is alleged, and is so glaring, and so prejudicial as to materially affect a substantial right, the court will consider it. Moreover, the error here complained of, goes to the power of the trial court to reinstate its judgment after the same had become null and void by reason of the order setting it aside.

In Windsor, vs. McVeigh, 93 U. S. 247, it is said:

"The doctrine that where a court has once acquired jurisdiction it has a right to decide every question which arises in the cause, and its judgment, however erroneous, cannot be collaterally assailed, is only correct when the court proceeds, after acquiring jurisdiction of the cause, according to the established modes governing the class to which the case belongs, and does not transcend, in the extent or character of its judgment, the law which is applicable to it."

As we understand it, by jurisdiction is meant the power conferred by law upon a court or judicial officer to hear and determine the matter in controversy between litigating parties, and to decide whether that state of facts exists which confers jurisdiction as well as all other matters properly raised in the case before the court. This power may be to exercise its authority rightfully, or it may act in excess of its jurisdiction, although having jurisdiction of the subject-matter, and decide wrongfully.

Under the law of the Territory the defendant in the trial court was by this departure from the prescribed practice, denied a second trial, upon which he was entitled to rely.

In the case of Ex parte Lange, 18 Wall. 178, it is said:

"There is no more sacred duty of a court, than, in a case properly before it, to maintain unimpaired those securities for the personal rights of the individual which have received for ages the sanction of the jurist and the statesman; and in such cases, no narrow or illiberal construction should be given to the words of the fundamental law in which they are embodied."

In Voorhees, v. Jackson, 10 Peters, 449, it is said:

"If not warranted by the Constitution or law of the land, our most solemn proceedings can confer no right which is denied to any judicial act under color of law, which can properly be deemed to have been done *coram non judice;* that is, by persons assuming the judicial function in the given case without lawful authority."

Plaintiff in error contends that this was an act in excess of the jurisdiction of the court. True, the court had the power to hear and determine controversies of this class, but only to exercise that power within its jurisdiction, which was limited by law.

It could not deny a second trial and enter a final judgment. When it did that, it ceased to act within its legiti-

mate power over the subject matter to adjudicate rightfully, and proceeded to exercise its power and act wrongfully.

It is not a mere question of erroneous judgment or of irregularity in obtaining the judgment, but it goes to the jurisdiction of the court, and the judgment is void. The power to assume jurisdiction is not denied, but the right to exercise jurisdiction not founded under and derived from the law of the land, and not exercised in the manner prescribed by the law, is here challenged.

In Curtis vs. Brown, 29 Ill., 201, the court said:

"We often find the jurisdiction denied where the power exists, but ought not to be exercised, and in this sense is the word 'jurisdiction' usually used when applied to courts of chancery. Where there is a want of power, the decree is void collaterally; but where there is said to be a want of jurisdiction merely, it is only meant that it would be erroneous to exercise the power, and the decree would be reversed on appeal,"

In Cooley on Torts, page 417, it is said:

"The officer is judge in the cases in which the law has empowered him to act, and in respect to persons lawfully brought before him; but he is not judge when he assumes to decide cases of a class which the law withholds from his cognizance, or cases between persons who are not either actually or constructively before him for that purpose. Neither is he exercising the judicial function when, being empowered to enter one judgment, or make one order, he enters or makes one wholly different in nature. When he does this, he steps over the boundary of his judicial authority and is as much out of the protection of the law in respect to the particular act as if he held no office at all. This is the general rule. Jurisdiction in a judge may be defined as the authority of law to act officially in the matter then in hand."

It must therefore follow as a legal conclusion that when a court cannot try a question except under particular

conditions, or when approached in a particular way, the law withholds jurisdiction, except such conditions exist and the court is approached in the manner provided.

In City of San Antonio vs. Dickman, 34 Tex., 647, that court, in passing upon the question here presented, lays down the rule in the syllabus thus:

"The granting of a new trial reinstates the cause upon the docket as though no trial had been had; and the court has no authority at a subsequent term to entertain a motion to set aside the order granting the new trial.

"When a motion to set aside an order granting a new trial has been improperly sustained at a term subsequent to the making of the order, a motion is legitimate at a term still subsequent to this last order to set it aside and reinstate the same for a new trial."

And in the body of the opinion, the court said:

"In this cause, judgment was rendered at the spring term, 1868, and at the same term a motion for new trial was sustained, and new trial granted; at the spring term, 1869, defendant moved to set aside and vacate the order granting new trial, and the court sustained the motion, and set aside and vacated all proceedings since the rendition of judgment.

"In December, 1870, plaintiff moved to set aside the last order and reinstate the cause upon the docket for a new trial; this motion was overruled by the court, and from this ruling the plaintiff appealed. It is believed to be a well settled principle that the granting of a new trial in a cause is to reinstate it on the docket as though no trial had been had; and the court has no more authority to set aside an order for new trial made at a previous term than it has to strike any other cause from the docket. Such an order or judgment would be a mere nullity. and therefore, under the authority of Gorman vs McFarland (13 Tex., 237), we do not hesitate to say that it was erroneous for the court to entertain the motion of defendant to set aside the granting of a new trial, and the order sustaining the motion is null and void; and the motion of the plaintiff to reinstate the cause upon

the docket was a legitimate and proper motion, and should have been sustained by the court."

In Miller vs. Commonwealth, 13 Penn. State 630, it is said:

"Jurisdiction in courts is the power and authority to declare the law. The very word in its origin imports as much; it is derived from *juris*, and *dico*—I speak by the law. And that sentence ought to be inscribed in living light on every tribunal of criminal power. It is the right of administering justice through the laws, by the means which the law has provided for that purpose. But here the mode and the manner of administering the justice of the country was not provided or prescribed by the law, and is directly prohibited by it. There was, therefore, no jurisdiction."

In the case of Harrigan vs. Gilchrist, 99 N. W. (Wis.) 933, the question is very ably considered and we quote from that opinion:

"A court may have jurisdiction of a particular subject matter, but by settled judicial policy ought not to exercise it. Again, it may, by the settled law, established by its own practice, deemed to be as binding as the written law, have power in a constitutional sense to adjudicate disputed matters of a particular character, acting by recognized unbending principles of procedure, but not jurisdiction to adjudicate such matters in the particular way attempted. In either case it is common to say of an exeessive exercise of authority, that it is without jurisdiction. If the excess has reference to want of power over the subject matter, strictly so-called, the result is void when challenged directly or collaterally. If it has reference merely to the judicial method of the exercise of power, the result is binding upon the parties to the litigation till reversed or set aside in some of the ways appointed by law. The former is usurpation. The latter error of judgment. That rule is said to be universal —to apply to the highest court as well as the lowest. The former cannot render a valid judgment outside of its constitutional authority, while its error within the scope of its authority stands on no higher plane than that of the latter,

except for the fact that there is no tribunal to which an appeal can be taken to correct it."

* * * * * * *

"The matter had not passed beyond the control of the court. It had constitutional authority, or, in other words, jurisdiction over such subjects and of the parties. Was judicial power invoked in a proper way—one which, by settled principles, it was permissible for the court to recognize as legitimate, whether consented to by the adverse party or not? If that must be answered in the negative, then, irrespective of whether the question was suggested for consideration by appellants, and although the judgment entered may be binding as long as it stands, the trial court obtained no jurisdiction of the subject matter of the litigation and its decree must be reversed on that ground.

* * * * * * *

"Where the Circuit Court possesses jurisdiction in the broad sense of thc term, but ought not to exercise it in the way invoked, or at all in the given circumstances, it should be deemed, to all intents and purposes, except in the sense of want of power so called, to be without jurisdiction where it ought, regardless of the atitude of the parties, to decline to act, it should be deemed, regardless of such attitude, not to have jurisdiction to act."

* * * * * * *

"But, as before indicated, a departure from established practice may be deemed so important as to be legitimately regarded as jurisdictional error to the extent that, though not available to avoid the judgment as the result of an excess of power, it may be raised by the adverse party for the first time on appeal as a ground for reversal, or the Court may and ought to take notice of it, whether insisted upon by such adverse party or not, and even if such party expressly waives it, and review the judgment upon that ground alone."

* * * * * * *

"All semblance of a definite system would be lost sight of, and the confusion of things would fatally affect the ability of trial courts, and appellate courts as well, to arrive at

the real truth and justice of disputed matters, with due regard to the convenience of litigants and the safeguarding of their rights. In that view the judicial rule should be firmly applied; suggested in Meyer v. Garthwaite and Burnham v. Norton; that while a trial court, though possessing power and jurisdiction in the general sense, ought not, under the circumstances, to exercise it, such exercise, whether by consent of the parties or not, is to be deemed, for the purposes of a reversal upon an appeal, akin to total want of jurisdiction of the subject matter in the broad sense of the term."

In the case of *ex parte* Lange, 18 Wall 163, the Court sentenced a prisoner to a fine and imprisonment under a statute authorizing either a fine or imprisonment. Said the Court:

"A judgment may be erroneous and not void, and it may be erroneous because it is void. The distinction between void and merely voidable judgments are very nice, and they may fall under one class or the other, as they are regarded for different purposes."

* * * * * * *

"It by no means follows that these two facts make valid' however erroneous it may be, any judgment the Court may render in such case. If a justice of the peace, having jurisdiction to fine for a misdemeanor, and with the party charged properly before him, should render a judgment that he be hung, it would simply be void. Why void? Because he had no power to render such a judgment. So, if a court of general jurisdiction should, on an indictment for libel, render a judgment of death, or confiscation of property, it would, for the same reason, be void. Or, if on an indictment for treason the court should render a judgment of attaint, whereby the heirs of the criminal could not inherit his property, which should by the judgment of the court be confiscated to the State, it would be void as to the attainder, because in excess of the authority of the court and forbidden by the Constitution.

"A case directly in point is that of Bigelow v. Forrest. In that case, under the confiscation acts of Congress, certain lands of French Forrest had been condemned and sold, and

Bigelow became the holder of the title conveyed by those proceedings. After Forrest's death his son and heir brought suit to recover the lands, and contended that under the joint resolution of Congress, which declared that condemnation under that act should not be held to work a forfeiture of the real estate of the offender beyond his natural life, the title of Bigelow terminated with the death of the elder Forrest.

"In opposition to this it was argued that the decree of the court confiscating the property in terms ordered all the estate of the said Forrest to be sold, and that though this part of the decree might be erroneous, it was not void. Here was a case of a proceeding *in rem.* where the property was within the power of the court and its authority to confiscate and sell under the statute beyond question; but the extent of that power was limited by the statute. The analogy to the case before us seems almost perfect. In that case the court said: 'It is argued, however, on behalf of the plaintiff in error that the decree of confiscation of the District Court of the United States is conclusive, that the entire right, title and interest of French Forrest was condemned and ordered to be sold; and that as his interest was a fee simple, that entire fee was confiscated and sold. Doubtless, a decree of court having jurisdiction to make the decree cannot be impeached collaterally, but under the act of Congress the District Court had no power to order a sale which should confer upon the purchaser rights outlasting the life of French Forrest. Had it done so it would have transcended its jurisdiction.' The doctrine of that case is reaffirmed in the case of Day v. Micou, at the present term, where it is said that in Bigelow v. Forrest, 'We also determined that nothing more was within the jurisdiction or judicial power of the District Court (than the life estate), and that consequently, a decree condemning the fee could have no greater effect than to subject the life estate to sale.'"

"But why could it not? Not because it wanted jurisdiction of the property or of the offence, or to render a judgment of confiscation, but because in the very act of rendering a judgment of confiscation it condemned more than it had authority to condemn. In other words, in a case where it had full jurisdiction to render one kind of a judgment, operative upon the same property, it rendered one which in-

cluded that which it had a right to render and something more, and this excess was held simply void. The case before us is stronger than that, for, unless our reasoning has been entirely at fault, the court in the present case could render no judgment against the prisoner. Its authority was ended. All further exercise of it in that direction was forbidden by the common law, by the Constitution, and by the dearest principles of personal rights, which both of them are supposed to maintain."

Further quoting from Windsor v. McVeigh, supra:

"The doctrine invoked by counsel, that where a court has once acquired jurisdiction, it has a right to decide every question which arises in the cause, and its judgment, however erroneous cannot be collaterally assailed is undoubtedly correct as a general proposition, but, like all general propositions, is subject to many qualifications in its application. All courts, even the highest, are more or less limited in their jurisdiction. They are limited to particular classes of action, such as civil or criminal; or to particular modes of administering relief.

* * * *

"So a departure from established modes of procedure will often render the judgment void; thus, the sentence of a person charged with a felony, upon conviction by the court without the intervention of a jury, would be invalid for any purpose. The decree of a court of equity upon oral allegations, without written pleadings, would be an idle act, of no force beyond that of an advisory proceeding of the Chancellor. And the reason is, that the courts are not authorized to exert their power in that way.

"The doctrine stated by counsel is only correct when the court proceeds after acquiring jurisdiction of the cause, according to the established modes governing the class to which the case belongs, and does not transcend in the extent or character of its judgment, the law which is applicable to it."

The Oklahoma Statute says "Thereupon the judgment shall be vacated, and the cause shall stand for trial at the next term." If the court after setting the judgment aside and granting a new trial can thereafter set aside the

order granting the new trial, and re-instate the judgment, thus denying to the party entitled thereto the right of a second trial, the court can do by indirect means, that which the statute positively forbids. If the court has the power to do this in one case, it has the power to do so in all cases, and by merely granting a new trial, and then setting that order aside, the court can defeat the purpose of the statute in every case. We submit that the court has not the power to do this. That when the judgment has been set aside, it is a nullity—not dormant merely, but dead,—and the court is without jurisdiction under the statute to re-instate it. The court can no more re-instate a judgment in such a case, over the objection of the party entitled to a second trial, than it can render judgment in the first instauce without a trial, and without giving the parties a chance to be heard. It is like summoning a party into court, and after he has appeared and filed his answer, then strike out his answer and pronounce judgment against him, without a hearing, and without a chance to be heard. It is saying to a party, appear and you shall be heard, and when he has appeared, saying your appearance will not be recognized and you shall not be heard. The trial court in effect said this. The plaintiff in error went into the trial of the cause, relying upon the statutory right of a second trial, and, as is usual in this class of cases, doubtless, failed to produce all the evidence relied upon to defeat the action. Under these circumstances, the refusal to allow a second trial, whether that refusal was direct in the first instance, or by the indirect means of first granting a motion for a new trial, and then setting the order for a new trial aside, is a denial of a substantial right,–a right granted by statute, and goes to the foundation of the claim in litigation. The principle here involved, lies at the foundation of all well-ordered systems of jurisprudence. Everyone has a right to defend when he is assailed in his person or property, for the liability and the right are inseparable. It is a principle of natural justice, recognized as such

by the common intelligence and conscience of all man-kind. A judgment pronounced by a court against a party without hearing him, or giving him a chance to be heard, is not a judicial determination of his rights, and is void, and may be attacked collaterally in the appellate tribunal.

In Edwards v. Edwards, 22 Ill. 121, it is said, quoting from the syllabus:

"The award of a new trial in a first ejectment suit, wipes out the verdict; no judgment can be rendered on it, nor is it a bar to any proceeding."

In the opinion, the doctrine is further announced, as follows:

"The award of a new trial in the first ejectment suit wiped out the verdict, and no judgment was or could be rendered on it. It is not a bar to anything. It might well happen that a plaintiff with a perfect title might fail in his suit by failing to prove possession by defendant at the time of suit brought, and a verdict passed for defendant. In such case, or in any case, if the verdict be set aside, it could not bar another action.

"Setting aside the verdict is as if it had never been used anywhere for any purpose. Followed by a voluntary nonsuit, the whole action and all its parts are null and void."

In Cook v. Calumet & C. Canal & Dock Co., 23 N. E. (Ill.) 629, it is said that an order granting a statutory new trial in ejectment is a final judgment and determination of the issues involved therein, and cannot be set aside.

To the same effect is the case of Indiana B. & W. Railway Co. vs. McBroom, 2 N. E. (Ind.) 760.

In conclusion on this point we assert:

First: That the order of the trial court of April 29, 1901, reinstating the judgment of the court of July 7, 1900, was null and void, because the court did not have the jurisdictional power to make such order; that when the judgment of July 7, 1900, was set aside and a new trial ordered,

and the cause continued for the term, the court did not have jurisdiction at that term, or at any subsequent term, to reinstate that judgment without a trial and without giving the plaintiff in error a chance to be heard; that after the judgment of July 7, 1900, had been set aside as aforesaid, the court had no more right, or power, or jurisdiction to reinstate that judgment without a trial than it had in the first instance to render a judgment without a trial and without giving the defendant a chance to be heard; that the order of April 29, 1901, reinstating the judgment of July 7, 1900, being null and void, every step thereafter taken based upon such void order was without jurisdiction and void.

Second: We contend, further that the order of April 29, 1901, reinstating the judgment of July 7, 1900, was error that affected the jurisdiction of the court; that said order, in effect, denied to the plaintiff in error the right to be heard in defense—a right guaranteed by statute and by every principle of fairness and natural justice; that the question here presented is jurisdictional and materially affected the foundation of a fundamental right, and, therefore, could not be waived; that this question being jurisdictional, and one that affected a fundamental right, the Supreme Court of the Territory committed material error prejudicial to the substantial rights of the plaintiff in error when it refused to entertain or consider it.

Third: That the question, being a jurisdictional one, and one that affects a fundamental right, and goes to the foundation of a substantial claim, this court, the Supreme Court of the United States, can, and should, consider and decide it. In support of these contentions, in addition to the cases already cited, see

Montana Ry. Co. vs. Warren; 137 U. S., 348-351;
San Pedro, etc. Co. vs. United States, 146 U. S., 120-136;
Jordon Mining Co. vs. Societe Des Moines, 164 U. S.. 261;
Arrington vs. Roach, 42 Ala., 155:
Waller vs. Sulzbache, 38 Ala., 318;
Feagan vs. Kendall, 43 Ala., 628;
Shaw vs. Brown, 42 Miss., 313;
Shanks vs. Carrell, 50 Tex., 17.

FOURTH, FIFTH AND SIXTH ASSIGNMENTS OF ERROR.

INCOMPETENT EVIDENCE ADMITTED. JUDGMENT. FINDINGS NO JUDGMENT. RES JUDICATA.

These three assignments of error present the question of the competency of the proof of plaintiff's title as the same was presented to the trial court.

The opinion of the Supreme Court of Oklahoma attempts to answer two objections made to the admission of the so-called judgment rendered in the case of McMaster vs. Townsite Trustees in the District Court of Canadian County, by holding,

First: That the Townsite Trustees were proper parties to the suit by McMaster, and

Second: That what is called a judgment of the District Court of Canadian County in that case, constituted findings of fact binding on the parties in this case. (Opinion, page 67.)

We wish to discuss these in their order. *First, Were the Townsite Trustees proper parties?* The Court bases its determination that they were proper parties, upon two cases. First, that of Cowell vs. Colorado Springs, 100 U. S., 55. We have read this case carefully and are entirely unable to find the quotation set out in the opinion of the court. We can find no such quotation as that contained in the opinion as being taken from Cowell vs. Colorado Springs, in the 100 U. S. Reports. In fact, an examination of that opinion does not disclose that there was any question of *res adjudicata* in that case.

The second case cited in this opinion is that of Kerrison vs. Stewart, 93 U. S., 155. The court, however, in applying that case to the one at bar, entirely failed to make the distinction contained in the following paragraph, immediately preceding the sentence quoted in the court's opinion, which is as follows:

"It can not be doubted, that, under some circumstances a trustee may represent his beneficiaries in all things relating to their common interest in the trust property. He may be invested with such powers and subjected to such obligations that those for whom he holds will be bound by what is done against him, as well as what is done by him. The difficulty lies in ascertaining whether he occupies such position, not in determining its effect if he does. If he has been made such a representative, it is well settled that his beneficiaries are not necessary parties to a suit by him against a stranger to enforce the trust."

It will thus be seen that the opinion of the court on this important phase of this case is based upon a decision of this court, which, in our opinion, has no application whatever to the case at bar, and which also shows that it is applicable to an entirely different class of cases to the one at bar, and it ought not to be necessary to review cases upon this question to determine whether the Townsite Trustees were proper parties in an action to determine whether private in-

dividuals or beneficiaries under the townsite act are necessary parties to an action concerning the disposition of the trust lands, because not only the Supreme Court of the Territory of Oklahoma, but this court, had decided this question before the opinion of the Supreme Court of Oklahoma was rendered in this case.

In the case of Bockfinger vs. Foster, 10 Oklahoma, 488, it was squarely held that in an action to declare a resulting trust under the act of May 14, 1890, the one in question here, the trustees were not proper parties, and that the town lot claimants are necessary parties to the action. That case was taken on appeal to this court and affirmed. Bockfinger vs. Foster, 190 U. S., 116-120. There the court said:

"The decisive question in the case is whether the plaintiff's claim to the land can be made the subject of a suit against the Townsite Trustees as such. Upon a careful scrutiny of the provisions of the Act of 1890, we are of the opinion that this question must be answered in the negative.

* * * * * *

"That the title was so held by the Townsite Trustees is, we think, clear. They did not hold an indefeasible title as of private right, with power to dispose of the land at will, but only as trustees for such occupants as should be ascertained, in the mode prescribed by the Act of Congress, to be entitled to particular lots within the townsite boundary. The trust was not, in any sense, of a permanent character. Its creation by Congress was only a step towards the ultimate transmission of the title of the United States to occupants under the Township (meaning Townsite) act. The United States retained its hold on the land until the title by proper conveyances should pass absolutely from it or from its officers or agents, the Townsite Trustees, to such occupants.

* * * * * *

"Under the Act of Congress, the title remained, in every essential sense in the United States until conveyed to the

occupant. The United States as the primary owner of the land could prescribe the terms upon which it could be disposed of to occupants. A suit against the Townsite Trustees to compel them, without regard to the Act of Congress, to convey to one who was not an occupant within the meaning of that act, was a suit to compel them to convey land which really belonged to the United States.

* * * * * * *

"By the scheme of this Act, the title is held in trust for the occupying claimants, it is true, but also in trust *sub modo* for the government until the rightful claimants and the undisposed of or surplus lands are ascertained."

It seems to us that under the decisions of the Supreme Court of Oklahoma, and of this high court in the Bockfinger case, it is wasting time to discuss this question as to whether or not the Trustees were proper parties to an action by McMaster to recover any part of the lands to which title was acquired under the Act of May 14th, 1890, and it is particularly useless to weigh, or attempt to weigh, against this decision in the Bockfinger case, cases which do not involve a similar question under a similar act. The Bockfinger case is under this very act, and therefore must be conclusive.

Second: The court attempts to answer the second objection to the introduction of the so-called judgment of the District Court of Canadian County, by holding that that record constituted "The findings and judgment of the District Court of Canadian County." This, we think, is equally untenable with the court's first position with reference to parties. The record shows clearly that what was done by Judge Burford in Canadian County constituted nothing but findings of fact, and the order that was made in this case in Kingfisher County, we claim, was entirely without jurisdiction because the District Court of Kingfisher County could not render a judgment in an action pending in the District Court of Canadian County.

Under the issues joined in this case it was necessary for the defendant in error, who was the plaintiff before the trial court to prove that he was the ower and entitled to the possession of the real estate in controversy. Without competent and sufficient evidence of these allegations, the defendant in error could not recover. The only evidence on this point adduced or offered on the trial was the exemplification of records, and contained in Exhibits "B" and "C" (pp. 36 and 38 of record), the facts from which are found in the court's opinion (pp. 66, 67, 68). These exhibits, which are embraced by reference and findings of facts stated in the court's opinion, are what purport to be the findings of facts of the District Court of Canadian County, and an order or judgment of the District Court of Kingfisher County, Oklahoma Territory, in a former suit between the defendant in error and the Board of Townsite Trustees of the city of Oklahoma City, and are as follows:

"EXHIBIT B.

"In the District Court, 2nd Judicial District, County of Candian, Territory of Oklahoma.

Frank McMaster

vs.

Townsite Trustees.

Frank McMaster, Plaintiff,

vs.

Edgar N. Sweet, Levi E. Coe, David H. Hammons, Defendants.

This case coming on to be heard before the Hon. J. H. Burford, judge of said court, on the pleadings and evidence herein, the court finds that the defendants were trustees of the townsite of Oklahoma City, in said county for the benefit of the actual occupants thereof under the Act of Congress approved May 14, 1890.

That on the 3d of September, 1890, said trustees entered at the land office of the United States at Oklahoma City, O.

T., the S. E. ¼ Sec. 33, twp. 12 N, range 3 west of the Indian Meridian, in trust for the use and benefit of the occupants thereof, and that a patent has been issued to said trustees for said land, to be conveyed by them to the occupants thereof as their several interests should appear at the date of said entry.

That said tract of land was on the 22d day of April, 1889, open to settlement under the act of Congress approved March 2nd, 1889, and that such tract of land was settled upon and occupied as a townsite shortly after noon of said day, and has continued to be and is now held and occupied.

That a portion of the occupants of said tract on said 22nd day of April, 1889, agreed tacitly to the plat of said tract of land, conveying lots, blocks, streets and alleys, and that the plaintiff herein on said day legally entered upon and occupied and has since contined to claim the piece or parcel of ground particularly described in the complaint as his lots.

That said piece or parcel of ground at that time was lots 1 and 2 in block 24, according to the plat so agreed upon. That the Exhibit A attached to the complaint is a correct copy of said plat.

That subsequently to such occupancy and prior to the conveyance to said trustees a different plat and arrangement of the streets, blocks, lots and alleys was adopted and enforced by the parties occupying the said townsite.

That by such plat the parcel of land claimed by the plaintiff was thrown into the street called Grand Avenue. The plaintiff did not consent but objected to said second plat, and has never consented thoreto or acquiesced.

That said tract of land is described as follows, according to the said last-named plat: Commencing at a point on the S. E. corner of block 23, according to the present plat and running southerly on a line with the west line of Broadway thirty-three and 10-100 feet from said southeast corner of said block 23, thence west from said west line of Broadway 140 feet, thence south fifty feet, thence east 140 feet, and thence north 50 feet to the place of beginning.

That thereafter he was by parties organized by said authorities forcibly removed from said parcel of ground and has since that time been forcibly kept from the occupancy of said tract.

That on the 21st day of April, 1891, this plaintiff applied to said defendants as such trustees for deed to said lot, but said trustees found the fact substantially as above stated, but declined to award him a deed for said lot or any part thereof.

That said city of Okaholma City has appropriated said lots to his own purpose as a street and so appropriated the same long prior to the conveyance of said tract by the United States to said trustees.

That C. G. Jones, A. C. Scott and Moses Neal are the successors in said trust of said defendants.

That said plaintiff was not an occupant of said tract of ground at the time the United States conveyed the same to the defendants as trustees, but said portion of said tract was at the time used and occupied as street by said city.

JNO. H. BURFORD, Judge."

EXHIBIT "C."

In the District Court, Canadian County, Second Judicial District, Oklahoma Territory.

Frank McMaster
vs.
Edgar N. Sweet, Levi E. Coe and David H. Hammons, Townsite Trustees, Board No. 2, and their successors.

"On motion in this case on the 13th day of October, 1893, being one of the regular days of said court at Kingfisher, in Kingfisher County, in open court, the same being in session, the following proceedings were had:

It is ordered herein that said defendants make, execute and deliver to Frank McMaster, plaintiff herein, a trustee's deed as decreed by this court, on the 14th day of November, 1892, of the following described premises and real estate, to-wit: Commencing at a point on the southeast corner of block (23) twenty-three as shown by the trustee's plat of Oklahoma City, O.T., running thence southerly on a straight line with the west line of Broadway as shown by said trustt ee's plat thirty-three and ten-one-hundredths (33 10-100) feet from said southeast corner of the block aforesaid to the place of beginning, thence west one hundred forty feet (140),

thence south at right angles with the line aforesaid fifty (50) feet, thence east parallel with the aforesaid east and west street line one hundred and forty (140) feet, thence north to the place of beginning, fifty (50) feet. Provided, however, that the said plaintiff shall fully —— all costs of said trustees in the making of the deed herein ordered.

In witness whereof I have hereunto set my hand and caused the seal of said court to be affixed this 13th day of October, 1893.

JOHN H. BURFORD, Judge."

That said suit was brought in Oklahoma County, and taken to Canadian County on a change of venue, where a trial was had, and the court on May.... 1892, made a finding of facts, a copy of which was put in evidence as Exhibit "B" (p. 36) and found by the Oklahoma Supreme Court, (pages 66-67-68). Upon this finding of facts no judgment was ever rendered, unless it can be said that the order of which Exhibit "C" is a copy, was such a judgment. This order, Exhibit "C" purports to be a judgment of the District Court of Canadian County, Oklahoma, rendered while the court was in session in Kingfisher County. The record is entirely silent as to how the case came before the District Court in Kingfisher County. There is no evidence in the record of any change of venue or order of the court for a change of venue to that county. The only semblance of authority for the rendition of a judgment by the District Court of Kingfisher County, is the fact that the same person, Hon. Jno. H. Burford, was the presiding Judge of both courts, and as the order recites that it is in a cause pending in the District Court of Canadian County, it should, therefore, be so taken and treated and as such must be void, because the District Court of one county cannot render a judgment in an action pending in the District Court of another county.

It is a well established rule of law, that the findings of a court as to the facts of a case upon which no judgment

has been rendered, do not constitute evidence in another action of the facts so found.

In the case of Child vs. Morgan, 52 N. W. (Minn.) 1127, the court says:

"The evidence on the part of the defendants was insufficient to establish the liens asserted by them. The evidence consisted only of the pleadings in a former action, and the findings of the court in the trial thereof, embracing the order of the court for the entry of judgment in accordance with the conclusions of law expressed: That was an action prosecuted by the defendant Morgan against some or all of these defendants, with others, to foreclose mechanics liens on this property. The findings of the court, thus introduced in evidence in this action, set forth the fact showing the existence of such liens and as legal conclusions therefrom it was declared that the several lienors named were entitled to a judgment as therein specified, and it ordered that a judgment be entered accordingly. No judgment, appears, however, to have been in fact entered. The findings of the court and order for judgment did not constitute a judgment, and they were not intended as such. They did not finally determine, as a judgment does, the matters in issue. The entry of a formal judgment, which should constitute a final adjudication, was contemplated and directed; but no such judgment was entered. These findings were as inconclusive as the verdict of a jury, which, without judgment thereon, has not the effect of an adjudication, (Schurmeier v. Johnson, 10, Minn., 319, Gil. 250,) and is not admissible in evidence. (Pitton v. Walter, 1, Strange, 162,) and so of a report of a master in chancery, (Nash v. Hunt, 116 Mass, 237). Judgment would not necessarily be entered on the findings and order, any more than on a verdict of a jury. A new trial might be awarded and no judgment ever be entered. Under our statutes, appeals will lie from judgments, and from orders involving the merits of the action but, as has often been held, such findings of a court, and orders for judgment are not appealable, either as judgments or as orders involving or determining the merits of the action. Von Glahn v. Sommer, 11 Minn., 203, (Gil. 132) Ryan v. Krantz, 25 Minn. 362, and cases cited; Shep-

ard v. Petit. 30 Minn. 119, 14 N. W. Rep. 511. Since the findings and order did not constitute an adjudication in favor of the lien claimants, they were not competent as evidence in this action to prove the liens asserted by them. Auld v. Smith, 23 Kansas, 65. This was not, of course, primary evidence of the furnishing of materials or labor,—of the facts from which liens arise,—and, if not an adjudication of such facts between the parties hereto, (or privies) we know of no rule of evidence which would permit proof of such facts to be made by presenting the inconclusive findings of the court in another cause."

The Supreme Court of Kansas declares that only a final determination upon the merits can be considered as an adjudication amounting to res adjudicata, and that findings of a court as to the facts can be considered such only in cases where they themselves are final, or in cases where a final judgment is afterwards rendered upon them, sustaining and confirming them. Upon this subject the case of Auld v. Smith, 23 Kansas. 65, the court says :

"It will be perceived that we have no evidence sustaining or supporting the findings made or judgment rendered in this case, except the findings made in said previous case, which findings are themselves not sustained or supported by any judgment rendered thereon, or confirming the same. Of course we now have reference to those findings made in the first case, showing that the defendants collected rents $470.75, in excess of the moneys which they paid out for taxes, and to those findings only. No judgment was rendered in that case for the said sum of $470.75, or any part thereof, or concerning the same, except the judgment dismissing the plaintiff's claim therefor. Now are said unsupported and unconfirmed findings any evidence in this case? We think not. Certainly they are not original evidence of the facts set forth therein, or of the facts which they were introduced to prove. Neither are they admissions made by the defendants, for the defendants took exceptions to them at the very time that they were made, and promptly moved to set them aside, and have never admitted their truth or correctness; and it cannot be said that they are adjudications

between the parties amounting to res adjudicata, for nothing but final determinations upon the merits are exalted to the preeminent distinction. (Freeman on Judgments Sec. 251; 2 Wharton's Evidence, Sec. 781, and cases cited.) Indeed, they cannot be considered as evidence against the defendants under any rule of evidence with which we are acquainted. Final judgments are of course adjudications; and findings of courts and verdicts of juries, and reports of commissioners or referees, may also sometimes be considered as adjudications, but they can be considered such only in cases where they themselves are final, or in cases where a final judgment has afterward been rendered upon them sustaining and confirming them, and even when confirmed by a final judgment they are adjudications only so far as they are necessarily included in and become a part of such judgment. A finding or verdict partially sustained by a judgment and partially not, is an adjudication or evidence in a subsequent suit, only so far as it is sustained by the judgment. A thing contained in the finding or verdict, but not included in or confirmed by the judgment, cannot be considered as an adjudication or used as evidence unless some other ground can be found for its use than merely that it is contained in such finding or verdict. We would refer to the following as among the authorities which we think tend to sustain the foregoing propositions.: Donaldson vs. Judge, 2 Bibb (Ky.) 57; McReady v. Rogers, 1 Neb. 124; Hawks vs Trusdell, 99 Mass. 557; Nash v. Hunt, 116 Mass. 237; Fisk v. Parker 14 La. An. 496; Whitaker v. Bramson, 2 Paine; 209; United States v. Addison, 73 U. S. (6 Wall) 292; Ridgely vs. Spencer, 2 Binney (Pa.) 70; Collins, v. Freas, 77 Pa. St. 493, 497."

In Massing v. Ames, 36 Wis. 409, the Court states the rule thus:

"Action to restrain the sale of plaintiff's lots for the taxes of a certain year, and set aside such taxes as illegal. The Court filed its findings of fact and conclusions of law, holding (in substance) that certain of the taxes were valid, and the remainder void, and that upon payment of the former within thirty days, plaintiff would be entitled to the relief demanded in the complaint in respect to all the lots affected by such void taxes, and that upon failure to make

such payment, the complaint should be dismissed; that the plaintiff, in any case, should pay the costs; and that there snould be 'judgment accordingly'. Thereupon one of the parties caused a paper to be drawn up reciting the findings of facts and conclusions of law, and adjudging in accordance therewith; and this was signed by the clerk and entered as a judgment. Held, on appeal therefrom as from a judgment.

(1) That the paper so entered was not a judgment, as it did not finally determine the rights of the parties.

(2) That it was wholly unnecessary as an order, adding nothing to the findings of fact and conclusions of law.

(3) That it must therefor be regarded as a nullity."

To the same effect is the case of Taylor, Shipton & Co., vs. Runyan, & Brown. 3 Iowa, 474, 480, in which the court says:

"When we speak of a judgment under our law, in its broadest sense, we mean all final adjudications of civil actions. Code Sec. 1814. At common law; this judgment is the sentence of the law, pronounced by the court upon the matters contained in the record of an action before it. When we speak of a final judgment, therefore, we understand it to be, the application of the law by the court, to the particular case before it, and specifically granting or denying the remedy sought by the action, 3 Black Com. 395. And the same author speaks of the judgment as "the remedy prescribed by the law for redress of injuries, and the suit or action as the vehicle or means of administering it. What that remedy may be, is indeed the result of deliberation and study, to point out, and therefore the style of the judgment is not, that it is decreed, or resolved by the court, for then the judgment might appear to be their own; but, 'it is considered' *consideratum est per curiam*—that the plaintiff do recover his damages, his debt, his posession, or the like, which implies that this judgment is none of their own; but the act of the law pronounced and delivered by the court, after due deliberation and inquiry. In general, the nature of the judgment is intimated or stated by the court, and the clerk enters it on the minutes in due form."

In Whitewell v. Hoover, 3 Mich page 84, the court says: (page 88)

"Before this amendment was made, there was clearly no final judgment entered in the cause. The entry showed nothing but the fact of interlocutory judgment, the order of reference to the clerk, and his action. It is true that it bears upon its face evidence of an omission of something but what was omitted could only have been inferentially determined. From the subsequent action of the court, it would seem that the omission was thought to embrace the assessment of the amount due upon the bond, and that which it was conceived went to constitute a judgment, viz: the words 'ordered final judgment for', and without which there was no evidence of an adjudication by the court.

"A judgment is the final consideration and determination of a court of competent jurisdiction upon the matters submitted to it, and it is only evinced by a record, or that which is by law,—as the files and journal entries of this State—substituted in its stead. An order for a judgment is not the judgment, nor does the entry of such order partake of the nature and qualities of a judgment record. This must clearly ascertain not only the determination of the court upon the subject submitted, but the parties in favor of and against whom it operates. Such is held to be the rule even in cases of judgments in Justices' Courts, and certainly it may not be relaxed in Courts of Record."

In Lincoln v. Cross, 11 Wis. 94, the court states the rule in the syllabus thus:

"An order in these words, 'Ordered judgment in this action' etc., is not a judgment, although signed by the judge, and will not justify the issuing of an execution. (Dean v. Williams, 1 Chand., 22; Wheeler v. Scott, 3 Wis., 362; Rape v. Heaton, 9 id., 328. Remington v. Cummings, 5 id, 138; Wadsworth v. Willard, 22 id., 238; and see Potter v. Eaton, 26 id., 382.)"

If the foregoing authorities correctly state the law, and we think they do, we may confidently assert that the findings of fact shown in Exhibit B, were erroneously admitted in evidence at the trial of the case.

The Organic Act of the Territory of Oklahoma recognizes a manifest distinction between the civil jurisdiction which it vests *ex pro-prio vi-gorie*, in the District Courts, and that which it does not specifically confer. The language of the Act clearly shows the design of Congress that the original civil jurisdiction of these courts should be subject to legislative control. Section 9 of that Act creates the various courts of the Territory, and declarse that the jurisdiction of these courts " shall be as limited by law". So far as the Organic Act itself operates as a specific grant of Territorial legislation, it is manifest that the original jurisdiction of the District Court is limited to the county for which the court is established, and in which it is held; and all the clauses of that Act, taken together, clearly indicate a design that the District Court in each county shall be a County Court, with jurisdiction, civil and criminal, limited to the county. Section 9 of that Act provides that :

"Said Territory shall be divided into three (now seven) judicial districts, and a District Court shall be held in each county in said district thereof by one of the Justices of the Supreme Court, at such time and place as may be prescribed by law, and each judge after assignment shall reside in the district to which he is assigned. The Supreme Court shall define said judicial districts, and shall fix the times and places at each county seat in said district, where the District Court shall be held and designate the judge who shall preside therein."

The legislative and judicial history of the Territory, show that this has been, from the beginning, the construction put upon the Organic Act by the profession and by the people. All the statutory law of the territory has been enacted in harmony with this idea. The Code of Civil Procedure limits the civil jurisdiction of the District Court to its own county; and is only under some positive statutory provision that mesne process can go to other counties.

The clause " as decreed by this court on the 24th day of November, 1902", page 38, evidently refers to some decree

of the District Court of Kingfisher County, but the record does not contain any such decree.

Furthermore the order of the District Court of Kingfisher County, Exhibit "C", shows upon its face that the court rendering that order did not have jurisdiction. The court in Kingfisher County had no jurisdiction to make such an order in a case pending in the District Court of Canadian County. That order purports to be an order or judgment of the court, and not an order of the judge, and the record and findings thus show want of jurisdiction in the District Court of Kingfisher County to make such an order in a case pending in the District Court of Canadian County. The law is that where the record affimatively shows a defect of jurisdiction, the judgment, even by a superior court, may always, both at home, and abroad, be attacked collaterally. This is true whether the jurisdictional defect is one which arises from a mistake in going beyond the scope of the law by the court, or is due to a failure to obtain jurisdiction of the cause or of the person of the defendant.

Smith's Leading cases, Vol. 2, pages 1017-1018.
Webster vs. Reid, 11 Howard, 437;
Thatcher vs. Powell, 6, Wheaton, 119;
Dicks vs. Hatch, 10 Iowa, 384;
Brown on Jurisdicton, 2nd Edition, section 34.

From what appears above, it can hardly be questioned that the order entered in the District Court of Kingfisher County upon the findings rendered in the District Court of Canadian County, is a nullity and utterly void. This being true, said order rendered in the District Court of Kingfisher County in the case of McMaster against the townsite trustees pending in Canadian County, could not operate as res adjudicata in this case against the City of Oklahoma City.

Sec. 5, page 717, Vol. 24, Am. & Eng. Ency. of Law, 2nd Ed;
Masterman vs. Masterman, (Kas.) 51 Pac. 277;
Gordon vs. Kennedy, et al., 36 Iowa, 167;
Zalesky vs. State Insurance Co. (Iowa) 70 N. W. 187.

In the Am. and Eng. Ency. of Law, *supra*, it is said:

"If, however, the court acted without authority in the premises, its decision is not merely voidable, but void, and affords no protection to those claiming or acting under it, and cannot successfully be set up as *res adjudicata*, against objection, in an action, whether upon the same, or a different cause of action."

RES ADJUDICATA OF FINDINGS IN McMASTER CASE AGAINST TOWNSITE TRUSTEES.

But even if McMaster, as an alleged occupant under this townsite act, could have maintained an action against the townsite trustees which this court has held, in the Bockfinger case, could not be done, then we contend the findings of fact in that case were not binding on the City of Oklahoma City, and that the Supreme Court of Oklahoma erred in so holding in its decision (pp. 66-67). If it had been the desire of McMaster to bind Oklahoma City in any subsequent action against it, the municipality, at the time incorporated, should have been made a party in the case of McMaster vs. Townsite Trustees. That the City of Oklahoma City then existed is beyond controversy, for the Supreme Court of Oklahoma finds (page 68) that "the land claimed by plaintiff was thrown into the street, in Grand avenue," and "THAT SAID CITY OF OKLAHOMA CITY HAS APPROPRIATED SAID LOTS TO ITS OWN PURPOSES AS A STREET, AND HAD APPROPRIATED THE SAME PRIOR TO THE CONVEYANCE OF SAID TRACT BY THE UNITED STATES TO SAID TRUSTEES;" and "that said plaintiff (McMaster) was not occupying said tract of ground at the time the United States conveyed the same to the defendants as trustees, but said portion of said tract was at the time used and treated as a street of said city."

It thus appears that it was long after its dedication to public uses and after its acceptance and use by the public that McMaster applied to the trustees for a deed, which they declined to make. Thereupon he brought his action against the trustees after the trustees had dedicated the land to public uses, and without making Oklahoma City a party to that action. It is under this statement of facts that the Supreme Court of Oklahoma holds that the findings of fact made by Judge Burford in the case pending in the District Court of Canadian County were "binding and conclusive upon not only the parties (meaning the trustees), but all persons claiming title under or through them."

This declaration of law as applied to the facts of this case, we claim was erroneous, not only upon the grounds above given, but also because Oklahoma City had acquired no interest after the findings made in the District Court of Canadian County or the order made in the District Court of Kingfisher County in such cause pending in the District Court of Canadian County.

Its interests in its public streets attached before those events, and they were not bound by that finding or order. This rule is well established. In Black on Judgments, 2nd addition, section 549, the rule is stated in the following language:

"Privies in such sense that they are bound by judgment, are those who acquired an interest in the subject matter after the rendition of the judgment. If their title of interest attached before that event, they are not bound unless made parties."

It seems to us, therefore, that those findings made in the case brought against the Townsite Trustees, and in which the City of Oklahoma City was not a party, long after this land had been placed in the street of Oklahoma City by a plat and arrangement of the streets, alleys, lots and blocks adopted and enforced by the people occupying

said townsite, and after the people upon the townsite, had enforced such plat and removed McMaster therefrom, as found by the Supreme Court of Oklahoma, and after Congress had recognized the acts of those people, as was done by the enactment of section 2 of the Act of May 14, 1890, under which these trustees were appointed (Supp. Rev. St. U. S., Vol. 1, 740). and after the trustees had approved the plat of this townsite, thus dedicating this land then and theretofore in the street to the public as a street, as the Supreme Court of Oklahoma also found, can not be held to be *res adjudicata* in an action brought against the City of Oklahoma City. These findings, we therefore claim, cannot be considered, and should not have been considered by the Supreme Court of Oklahoma, to establish any right in McMaster to the ground sued for.

We think there can be no reasonable doubt that the Supreme Court of Oklahoma is wrong upon both its answers to the objections to the introduction of these findings, the facts relating to which the opinion recites, and that the record in the case of McMaster against the Townsite Trustees was not competent evidence in this ejectment suit against the City of Oklahoma City, and the City of Oklahoma City can in no way be bound thereby, and of course, if this is true, then there are no facts whatever to show that McMaster has any title or ownership in this land, and this would dispose of the case without consideration of the other questions.

SEVENTH, EIGHTH, NINTH, TENTH, ELEVENTH AND TWELFTH ASSIGNMENTS OF ERROR.

DID McMASTER ACQUIRE A VESTED RIGHT IN THIS GROUND IN THE STREET OF OKLAHOMA CITY?

These assignments of error present, and under them we wish to discuss the real question involved in this controversy between the city of Oklahoma City and Frank Mc-

Master; for, if he had no vested right in this ground prior to the time it was dedicated by the plat made by the Townsite Trustees, and which plat is shown in the record and found in the opinion of the court, and which plat placed this ground in Grand avenue, a street of the city of Oklahoma City, and where it had been placed by the plat made by the people who located upon the townsite when they came to finally determine where the streets should be, as the Supreme Court of Oklahoma also finds, upon which should be located lots which, under the townsite act in question, and lots only, could be acquired by the occupants of the said townsite, then certainly McMaster is not entitled to recover this property and close up said street and eject the city authorities therefrom.

Even if this court should treat the findings of fact made by Judge Burford in the McMaster case against the trustees in Canadian County and the order made thereon in the District Court of Kingfisher County as the facts upon which to determine McMaster's claim to this land in the street, then under these facts McMaster is not entitled to recover this land. Those findings and that order certainly could not have more force and effect than if the order had been carried into full operation and had been complied with by the trustees, giving to McMaster a trustees' deed to this land, which had previously by the trustees been platted into a street. In other words, if these findings and this order, which are made so much of by the Supreme Court in the discussion of this case, had been fully carried out by making a deed to this ground to McMaster, then the case would be presented upon its merits under the facts as found by the Supreme Court of Oklahoma, with a plat made by the townsite trustees in September, 1890, platting this ground into a street in Oklahoma City and a deed therefor made to McMaster by the trnstees for a part of this street; and this would present the real question of merit in controversy between these two litigants under the assignment here made.

We wish to discuss these assignments under two heads, (1) The cases cited and referred to by the Supreme Court of Oklahoma in support of its opinion on this point; and (2) The Beamer case, decided some years ago by the Supreme Court of Oklahoma Territory.

CASES CITED BY OKLAHOMA SUPREME COURT.

The cases cited in the opinion of the Supreme Court of Oklahoma on the question of the alleged vested right of McMaster have no application whatever to this case, and the error in the argument in the opinion lies in the assumption that "the defendant in error herein (McMaster) had legally entered upon said tract of land, and was occupying it in accordance with the rules and regulations of the Land Department." Now, there were not only no rules and regulations of the Land Department for McMaster's occupancy of this ground when and while he occupied it, but there was not then even any law of Congress providing for such regulations. His occupancy was on April 22, 1889. It was more than a year after that time before the act providing for the acquiring of title, and under which the regulations of the Secretary of the Interior were made, was passed, and that law and these regulations providing for the platting of this land and the creation of streets, as before suggested, necessarily contemplated that the land platted into streets should vest in the public and for the public use, and not in an individual.

The case of Sturr vs. Beck, 133 U. S., 541, cited in the opinion of the Supreme Court, is a case of a homestead entry, and the quotation made from that case in the court's opinion is the granting clause of the homestead law, with the ruling of the Land Department with reference thereto.

The case of Witherspoon vs. Duncan, 4 Wallace 210, is a case of an entry made at a land office, and a certificate of donation entry issued.

The case of Burlington & S. W. R. Co. vs. Johnson, (Kan.) 16 Pac. 125, is a case where a railroad company took its right of way out of land covered by a homestead entry. The distinction between cases of this character under the homestead law, and other laws vesting the right in the entryman, and this case, where there was no homestead entry, and no law under which, at the time of the occupancy of McMaster, he could ever make an entry or acquire any title to the land occupied, and where the act granting title to the land, when passed, and the regulations thereunder, and the execution of the trust as made by the trustees, placed the land claimed in a public street for public purposes, must be clearly apparent, and, in fact, is clearly shown in the case of Beamer vs. The City of Guthrie.

The case of Cook vs. McCord, 9 Okla. 200, is one where two parties were claimants for a lot (not a street), and a deed was issued to Cook, one of the contestants therefor. That case manifestly cannot be in point here.

The case of Betts vs. Townley, 20 L. D. 425, is cited only with reference to the question of abandonment, which is of no consequence in this controversy, which hinges, of course, upon the question, not of the manner in which McMaster complied with the law with reference to a lot or tract of land to which he could acquire title, but to the question as to whether he could acquire title to a piece of land which went to the public under the grant from the United States under which he must claim title.

The Supreme Court of Oklahoma not only applied the rule which prevails in homestead cases where a vested right is granted under a full and complete act of Congress, entirely different from the legislation of Congress in force in this case at the time of his alleged settlement, April 22, 1889, but the court entirely misconstrued the Act of March 2, 1889, and confuses subsequent regulations of the Land Department. The court, in its opinion on this point, says (p. 68):

"That said tract of land described in said patent to said Trustees was on the 22nd day of April, 1889, opened to settlement under Act of Congress approved March 2, 1889. (C. 412 Sec. 13, 25 Statutes at Large 1005;) * * * Now, this finding of the court shows that at the time that this land was opened for settlement under the Act of Congress the defendant in error had legally entered upon said tract of land and was occupying it, in accordance with the rules and regulations of the Land Department. That being true, we take it *that his interest and rights in said land attached at that time*; that when he had complied with the rules and regulations of the Land Department he was entitled to a deed; * * * His rights must be determined, it seems to us, by the conditions as they existed at the time of his settlement upon these lots, which, according to the findings of the District Court of Canadian County, was on April 22, 1889. * * * If, at that time, he had complied with the law and the rules of the Land Department, and was entitled to a deed, then no subsequent action of the occupying claimants, of the townsite, or the Townsite Trustees, or the City of Oklahoma City, could take away his rights without his consent."

* * * * * * * * *

The trouble with the application of the law to the facts thus is based upon an incorrect premise. Of course, if at the time McMaster made his settlement, April 22, 1889, "he had complied with the laws and the rules of the Land Department and was entitled to a deed" to this ground, then no subsequent action of the Board of Trustees could defeat his right to receive such title. But the trouble with his situation is that he had not complied with the law so as to entitle him to a deed, because there was no law then in existence under which he could possibly obtain a deed, and it required subsequent legislation of Congress, which was enacted on May 14, 1890, in order that he or any other person could get a deed to any part of this townsite. There was no way under the Act of Congress of March 2, 1889, that McMaster or any other person on the Oklahoma City Townsite could get a deed to any part of that townsite. The part referred to of said act reads.

"The Secretary of the Interior may, after said proclamation, and not before, permit entry of said lands for townsites, under section twenty-three hundred and eighty-seven and twenty-three hundred and eighty-eight of the Revised Statutes, but no such entry shall embrace more than one-half section of land,"

Now, sections 2387 and 2388 were applicable only in an organized State or Territory, and Oklahoma was neither, and did not become a territory until May 2, 1890. Sections 2387 and 2388 provide the machinery for acquiring title to a townsite where there is an incorporated town or a judge of the county court of the county, of which Oklahoma at that time had neither, because there were no laws providing for local governments here; that is, no laws providing for the incorporation of towns or cities or for theorga nization of counties and were none until the Organic Act was passed May 2, 1890, (Supp. Rev. St. U. S., Vol. 1 720). The rules and regulations of the Land Department relied upon in the court's opinion were also as wanting as the necessary Act of Congress under which McMaster "was entitled to a deed." No rules and regulations were ever made by the Land Department which provided in any way whatever for any persons acquiring a deed to a town lot or any part of a town lot in Oklahoma until after the passage of the Townsite Act of May 14, 1890, and the regulations of the Land Department providing for these deeds were made to carry out the provisions of the Act of May 14, 1890.

The preliminary circular of the Interior Department under this act, appears in 10th Land Decision, page 604, and the extended regulations therein referred to were approved by the Secretary of the Interior on June 18, 1890, and appear in 10th Land Decisions, 666, and a further circular concerning such regulations was made to the trustees of townsites in Oklahoma by the Secretary of the Interior on July 10, 1890, and appears in 11 Land Decisions, 24, and it was under these regulations and not under any regulations

made by the Land Department under the Act of March 2, 1889, that occupants of townsites in Oklahoma obtained deeds to their lots.

The Townsite Trustees performed their functions and their duties under these regulations, but McMaster, under the facts found by the court, had been dispossessed from his settlement, and this ground had been appropriated as a street of Oklahoma City long prior to that time. The entire question, however, of the alleged vested right of a townsite settler is fully covered by the decision of the Supreme Court of Oklahoma in the Beamer case, 3 Okla. 652.

A review of all of the citations of the Supreme Court of Oklahoma in support of its judgment in this case, shows that none of them in any way effect its former opinion in the case of City of Guthrie vs. Beamer, supra, or the higher determination of this court in the Bockfinger case.

THE BEAMER CASE.

The decision of the Supreme Court of Oklahoma, appealed from, upon the facts as set out in that opinion is not only squarely opposed to the Bockfinger case on the question of necessary parties, but it is equally opposed to the decision of the Supreme Court of Oklahama, in the case of the City of Guthrie vs. H. C. Beamer, supra, which goes to the merits of this controversy between McMaster and the City of Oklahoma City. The dissent of Mr. Justice Pancoast in this case is based upon the Beamer case. There is no distinction whatever, of law, that can be drawn between this case and the Beamer case. The only difference between this case and that case is, that in the Beamer case there was a stipulation as to the facts which does not appear in this case, but the court will observe that the Supreme Court of Oklanoma, in the Beamer case, did not by any means confine its consideration of the questions of law involved to the facts as set out in

the stipulation. The court considered the common history of the country, and took judicial knowledge of the essential facts with reference to the opening of a townsite at Guthrie, and the same judicial knowledge could, and should of course be taken in this case concerning the opening of the townsite at Oklahoma City, under the same act of Congress. That the court should recur to the history of the times and conditions under which an act of Congress which is under construction was passed, and take judicial notice of the facts concerning the disposition of public lands, is recognized in the cases of Knight vs. U. S. Land Association, 142 U. S., 161, and Smith vs. Townsend, 148 U. S., 490. And if the court holds against us on the question of the admissibility of of the findings of facts made by Judge Burford in the case against the Townsite Trustees in proof of McMaster's title to this ground in the street, then we say the law, as laid down in the Beamer case, is correct, and should be applied to these findings as they appear in the record and in the opinion of the Supreme Court of Oklahoma, and that these facts so found should be applied to this case and viewed in the light of the common history of the opening of Oklahoma to settlement, April 22, 1889, and the establishment of townsites and the early founding, control and building of cities therein when there was no law for the acquirement of title to the ground on which many permanent and lasting buildings were erected, and streets and alleys of necessity provided therefor, and which at times required the "provisional governments" in those cities to establish streets where settlements had been made. The right to do this was affirmed in the Beamer case, and the case at bar is another like it, and should have been followed in this case, as indicated by Mr. Justice Pancoast in his dissenting opinion.

From this record, it appears (page 36, opinion 66 and 68) that the townsite of Oklahoma City was patented by three townsite trustees under the act of May 14, 1890, and

in these findings of Judge Burford in the case of McMaster against the Trustees in Canadian County, it appears, (page 36 of record) and in the oppinion of the court, page 68, that on April 22nd, 1889, McMaster entered upon and occupied, and has since attempted to claim the piece of ground in controversy; that on April 22, 1889, this ground was a lot in accordance with a plat tacticly agreed upon by the occupants and "that subsequently to such occupancy and prior to the conveyance to said trustees, a different plat and arrangment of the streets, blocks, lots and alleys was adopted and enforced by the parties occupying the said townsite. That by such plat, the parcel of land claimed by the plaintiff was thrown into the street called Grand Avenue. That plaintiff did not consent, but objected to said second plat and has never consented thereto or acquisced."

"That said City of Oklahoma had appropriated said lots to its own purpose as a street and so appropriated the same *long prior to the conveyance of said tract by the United States to said trustees.*"

"That said plaintiff was not an occupant of said tract of ground at the time the United States conveyed the same to the defendants as trustees but said portion of said tract was at the time used and occupied as a street by said city."

These facts are recited at length and referred to by exhibit in the decision from which we appeal and the law as applied therto is therefore now here for review.

Under these findings of fact, which are the basis of the opinion of the Supreme Court of Oklahoma in this case, and which are set out in the opinion of the court, we claim that the case comes squarely within the Beamer case, and that McMaster never acquired a vested interest in this property in Grand Avenue. At the time McMaster settled there, there was no law under which he could acquire title to any part of said tract as a townsite, and it required the Act of May 14, 1890, to give to McMaster as an occupant

of a lot, (if he were an occupant of a lot, much less a street), any right to ever acquire any title thereto, and without the Act of May 14, 1890, he nor any other occupant of that townsite could ever have acquired any title to any portion of it, because there was no law of the United States defining the terms or manner of acquiring title to townsites in Oklahoma. And the Government which provided an act by which these people could acquire title to townsites in Oklahoma could of course prescribe the terms and manner upon which that title might be acquired. These terms are contained in the Townsite Act of May 14, 1890, (Supp. to Rev. St. U. S. Vol. 1, page 739). The first section of that Act provides, among other things.

"And when such entry shall have been made, the Secretary of the Interior shall provide regulations for the proper execution of the trust, by such trustees including the survey of the land into streets, alleys, squares, blocks and lots when necessary, or the approval of such survey as may already have been made by the inhabitants thereof."

It was thus provided as a part of this grant, that the lands of the United States granted in Oklahoma for townsite purposes under this act, should be entered by trustees under regulations of the Secretary of the Interior for the execution of the trust by the Trustees, including the survey of the lands into streets, alleys, blocks and lots, and it was therefore necessarily contemplated that whatever land was surveyed into streets and platted into streets and alleys by the Trustees, whether they approved the existing survey or not, should forever remain streets and alleys and be set aside for the public use, and it was thus necessarily contemplated that no private individual could ever acquire any right thereto. The findings of facts in this case show that this property which McMaster claims was a part of a street, and a part of Grand Avenue which is in fact one of the principal streets in the City of Oklahoma City, and was such a street LONG PRIOR TO THE TIME WHEN

THIS LAND WAS ENTERED BY THE TOWNSITE TRUSTEES. McMaster was not an occupant of the land at the time the land was entered by the trustees, but his dispossession thereof occurred long prior to that time. He could acquire no vested interest in any part of said land until the trustees should survey the land into lots, for it was only lots that a settler could acquire title to. He certainly could acquire no vested title in a public street. The bounty of the Government was not extended to townsite occupants for the purpose of enabling them to acquire title to a street and it was never contemplated that the townsite trustees of any townsite or a city built thereon, should be involved in litigation by a townsite claimant claiming a lot in a street. That it was lots that a settler might make claim for and lots alone, we think is made clear by this court in the Bockfinger case. The syllabus in point reads:

"The Townsite Trustees do not hold an indefeasible title as of private right, with power to dispose of at will, but only as trustees for such occupants as may be ascertained, in the mode prescribed by the act of Congress, to be entitled to particular lots within the townsite boundary."

This whole question, however, has been so fully discussed in the Beamer case, *supra*, and so ably considered that it should be decisive of this case. It is there said:

"One claiming public lands as a homestead, pre-emption or townsite settler acquires no vested interest as against the United States until an entry is made at the proper land office.

* * * * * * * * *

"While it is true that the act of May 14, 1890, provides that the lands occupied for purposes of trade and business shall be entered by the trustees for the use of the occupants thereon, it also contemplates the entry of platted lands, lands that have been or shall by the trustees be platted into lots, blocks, streets and alleys.

"While the act recognizes the rights of settlers and oc-

cupants in so far as the same are consistent with the purposes of the act, it also authorizes the Secretary of the Interior to approve any survey that has already been made by the inhabitants of such town, or to provide by regulations for a survey of the land into lots, blocks, streets and alleys when necessary.

"The power of Congress over the disposition of the public lands is supreme, and so long as the title is in the United States and no entry of the land has been made under any law of the United States, or no rights of settlers or occupants have attached, Congress may make such disposition as the law-making power may declare, although it may work injustice or hardship to claimants for such lands.

* * * * * * * * *

"If the rights of a pre-emption or homestead claimant do not attach to the land as against the United States until the entry of the land is made, then we know of no reason why the settlement or improvement of a townsite occupant will entitle him to any greater or superior rights. And, applying the rule applicable to homestead and pre-emption claimants as announced by Mr. Justice Miller, *supra*, which we think is applicable to the case at bar, Congress had the right and authority to make such disposition of the lands embraced in the Guthrie townsite for streets, alleys and public highways as, in the wisdom of the lawmaking power, seemed proper, and the authority vested in the Secretary of the Interior to adopt a plan and survey already made, carried with it, when such adoption was made, an express dedication of the lands shown on the plats as streets to the public uses and divested all claims of private parties.

* * * * * * * * *

"When the Secretary of the Interior, or the trustees appointed by him, under his instructions adopted and approved the plat of the townsite of Guthrie, which the inhabitants had made long prior to the entry of the land by the trustees, the lands designated as public streets on such plats, were dedicated to the public use, and the act of Congress and the action of the Secretary under the power vested in him by said act, had the effect to divest any individual interest that

might have been asserted to such portion of said land, and Beamer had no rights or interest in the public streets which can be conveyed to him by the trustees.

* * * * * * * * *

"It is a part of the general history of the settlement of the City of Guthrie, that prior to the opening of the country to settlement, on April 22, 1889, and prior to the settlement and occupancy of the lands embraced in the townsite, no plats had been adopted, and no sub-divisions of the lands into lots, blocks and streets had been made, and no valid or legal survey, plat or sub-division could have been made until after the lands were open to settlement. Thousands of people desiring to acquire lots in the projected city went upon the lands now constituting the City of Guthrie, and each for himself undertook to acquire by occupancy or improvement, some particular portion of said tract for his own use. As a natural result there was no order or regularity in such settlements, and everything was chaos and disorder. There was no municipal government and no authority for any. There was no law in the territory at that time by which a municipal government could be formed, and no person had authority to act for the masses. It became necessary to bring order out of chaos, and to settle the many conflicting interests by some general rule or authority that the masses would recognize. 'The very nature of the land settled upon and occupied as a townsite implies the existence of streets, alleys, lots and blocks, and for the possession of the lots and their convenient use and enjoyment there must of necessity be appurtenant to them a right of way over adjacent streets and alleys. The entry of the land carried with it such a right of way. The streets and alleys were not afterward at the disposal of the government, except as subject to such easement.' (Ashby vs. Hall, 119 U. S. 526.)

"Every person who attempted to settle upon said lands in such chaotic state established his settlement rights with full knowledge and notice of the fact that before the same could be entered as a townsite or any title acquired from the government, that such lands must of necessity be platted and laid off into blocks, lots, streets and alleys, and took whatever of interest he acquired, subject to this right, and whatever would result from it. Prior to such platting

and sub-division no person could acquire any interest in any definitely described or particularly bounded portion of said tract. There was no way by which it could be determined what the quantity of land would be that would fall to the portion of any settler or occupant. The title acquired by a townsite settler by occupancy or improvement is in and to a lot or lots—such lot or lots must be determined by a plat, survey and sub-division adopted in some manner and generally acquiesced in.

"Recognizing this uncertain, chaotic and disorderly condition of affairs, the experience and intelligence of the American people asserted itself, and they made a rule and law for themselves, and organized committees by and with the consent of the settlers, and empowered them to make surveys and plats and to bring order out of confusion. The people generally acquiesced in this action, and adopted the result of their work and conformed their settlements to the lines of the blocks, lots, streets and alleys as designated by such committees and the provisional government organized by the people for their own guidance and government.

"This step was necessary in order that the settlers might acquire some definite location and become occupants of some definite portion of said tract, otherwise, a townsite never could have been entered or title acquired, as every portion of the tract was occupied and claimed by some person. When these surveys and plats were made, those who were so unfortunate as to have made their location in such portions of the tract as were required for streets were bound to give way, as they had taken their chances in the great lottery for a lot when they had stuck their stake, and had drawn a blank. All could not be on lots, and this they all knew. Some were on lands that had to be used for streets in laying off a town, and this they all knew, Without streets and lots and blocks, there could be no town, and this they all knew, hence no specific interest could be acquired until there was a particular sub-division to which such right could be attached. The people were several days in bringing order out of confusion, and the provisional government which had been organized with the consent of the goverened, was charged with the duty of providing some means of communication between the various portions of the city."

Now, the general history of the city of Oklahoma City at that early date was the same as the general history of the settlement of the city of Guthrie, and the court should take that general history into consideration in this case the same as the Supreme Court of Oklahoma did in the Beamer case. The same necessity for the bringing of order out of the chaotic condition at that early date, the same necessity for the use of the military authorities of the United States in preserving that order, as this court will take judicial notice, existed at Oklahoma City as it did at Guthrie. The same necessity for a provisional organization by the settlers existed at Oklahoma City as it did at Guthrie. The same necessity for the laying out of streets and alleys existed at Oklahoma City as it did at Guthrie. The same approving by the trustees of the survey and plat which was finally adopted by the settlers was done at Oklahoma City as at Guthrie. It was necessary for the trustees to make and approve a plat before they could convey lands to the occupants. The plat, which is contained in the record (page 38) and which gives Grand avenue, in which the land that McMaster claims lies, is a copy of the plat of the townsite of Oklahoma City as made and approved by these townsite trustees, and which is the basis of the title upon that townsite. That plat shows that lots and blocks of convenient size and that streets and alleys at regular intervals were made. However, the decision of the trustees, under the regulations prescribed by the Secretary of the Interior, would, of course, be final and conclusive as to the location of such streets and alleys. It appears in this case, however, that the location of the streets and blocks is the same now, or the same when this case was tried and upon which the findings were made, and which existed the same as before the entry of the townsite, so that the townsite trustees did not disturb any existing condition. What disturbances were made, what controversies occurred, if the court please, betwean the Kickapoos and the Seminoles in the early history of this now important city of Okla-

homa, is of little consequence to this case, as it does appear that McMaster was not an occupant of this ground when the United States conveyed the land to the trustees for trust purposes, and whether he was dispossessed by Kickapoo or Seminole, he was dispossed by the early adjustment by the people to the streets and alleys which they created in this townsite. The trustees found the land in controversy in a street. They left it in the street, and deeded lots and blocks with reference thereto. The city can certainly not now be divested of this street, which has been such since prior to there being a city—a street created in that sovereign power of American citizenship to adjust itself to existing conditions.

THIRTEENTH AND FOURTEENTH ASSIGNMENTS OF ERROR.

These assignments are, of course, virtually included in the others that are presented in this brief. If our positions are correct, then the Supreme Court of Oklahoma erred in affirming the judgment of the District Court of Oklahoma County, which should have been for the defendant in that court, and erred in overruling our motion for a new trial, which was presented, and the court erred in finally rendering judgment against us, which is included in the sustaining of McMaster's motion to vacate the order granting us a second trial, as is allowed by our statute in an ejectment case. Our arguments upon these specifications are presented in the points of law raised in the brief.

FIFTEENTH ASSIGNMENT OF ERROR.

FIRST—EJECTMENT NOT THE PROPER REMEDY.

We contend that whatever may be the rights of the parties to the possession of the ground in controversy, that under the facts as declared by the court in this case, the court should have dismissed plaintiff's (McMaster) petition, and that he was not entitled to recover a judgment for the

possession of this ground. We contend that ejectment will not lie to recover possession of ground which has been appropriated to a public use.

This being a statutory action for the recovery of real estate, the same principles that obtain in the old common law action of ejectment apply here. The right to the possession of the real estate in controversy is the gravamen of the suit, the ground and essence of the complaint. It being a possessory action, the defendant in error to be entitled to recover, must have the right of possession; and whatever takes away from him this right of possession will deprive him of the right to recover in this action. Now the real estate in controversy, as we have seen, is a part of Grand Avenue, one of the principal streets and public thoroughfares in the City of Oklahoma City, a public or municipal corporation. If the city wrongfully took possession of this tract of ground and is holding it for no authorized public purpose or use, then the action can be maintained, and the defendant in error can recover. But the court found that this real estate had been dedicated to the public for an authorized public purpose, and is kept and used by the public for an authorized public purpose, a street of that city. The City of Oklahoma City is a municipal corporation of Oklahoma Territory and a city of the first class, under the laws of said Territory. (See petition of defendant in error filed in the trial court, pages 2 and 59 of record). The tract of land on which said city is founded was conveyed by Patent from the Government of the United States to "Edgar N. Sweet, Levi C. Coe, and David H. Hammons, Trustees of the Townsite of Oklahoma City, in the second county of Oklahoma Territory, in trust for the several uses and benefits of the occupants of the townsite of Oklahoma City, in in said county and Territory, according to their respective interests." (See Exhibit A, page 29 of record and decision, page 68). This Act of Congress required the Trustees,

under the regulations of the Secretary of the Interior, to survey the land into streets, alleys, squares, lots and blocks, or to adopt such survey as may have theretofore been made. Prior to the date of the Patent of the United States, to the Trustees, two plats, or surveys of the tract of land into lots, blocks, streets and alleys were made by the inhabitants of the townsite. The first one was agreed upon and accepted by only a portion of the occupants of the townsite, and was made April 22, 1889. According to this plan, the plat of ground in controversy was described as lots one and two in Block 24, and was claimed by McMaster, the defendant in error, as townsite occupant. A second plat, or survey was made subsequently, according to which the plat of ground in controversy was thrown into and became a part of Grand Avenue, one of the principal streets of the city. This second plat or survey was adopted and enforced by the townsite occupants prior to the organization of the town as a municipality under the Organic Act of the Territory; and was also adopted and approved by the Board of Townsite Trustees, (see opinion, page 68, and Exhibit F). This second plat or survey was adopted and enforced by the municipality under its organization under the laws of the Territory, and continued to be the plan of the city up to the date of the trial of this cause.

The record conclusively shows that all the plot of ground in controversy here was, by the Board of Townsite Trustees, acting under the instructions of the Secretary of the Interior, as provided by said Act of Corgress of May 14, 1890, set apart for the use and benefit of the public as a street and public thoroughfare of said city. The adoption and approval of the plat by the Trustees, under and in accordance with the said Act, was a dedication to the public by the United States of all the land designated in said plat as streets; and under the doctrine announced by the Supreme Court of the Territory in the case of City of Guthrie vs. Beamer, 3 Okla., 652, such appropriation to a public use,

divested McMaster, the defendant in error, of all his interest therein acquired by settlement of occupancy prior to the entry of the land by the Trustees. It was a complete statutory dedication of all the lands embraced in the streets and alleys designated on the plat, which includes the ground in controversy, to the public use, and vested the fee therein in the municipality, to be held in trust for the use and benefit of the public. City of Guthrie vs. Nix et al, 5 Okla., 556; Bockfinger vs. Foster, 10 Okla. 488.

The law as announced by the Supreme Court of Oklahoma in the cases above cited is applicable to the case at bar. The title to the tracts of land embraced in both the townsites of Guthrie and Oklahoma City were acquired from the United States under the same Acts of Congress, by the same methods, and by the same, or similar rules and regulations of the Secretary of the Interior; and the rules of law as applied to the one is likewise applicable to the other. Applying the law in the cases cited, to the case at bar, it follows with irresistible force and conclusiveness that the defendant in error never had such interest or title to the land in controversy as would entitle him to bring or maintain this action for the recovery thereof.

But if we stop and consider this case on principle, and inquire as to its purpose and object, it cannot be sustained on any rational grounds. The object and purpose of the action is to obtain possession of the land in question, and of such action this court, in the case of Dickerson vs. Colgrove, 100 U. S. 578-82, said, quoting the following language from the case of City of Cincinnati vs. Lesee of White, 6 Peters, 431:

"This is a possessory action, and the plaintiff, to entitle himself to recover, must have the right of possession; and whatever takes away this right of possession will deprive him of the remedy by ejectment."

The judgment of the trial court, affirmed by the Su-

preme Court of the territory was, "That the plaintiff (defendant in error) do have and recover of and from the defendant (plaintiff in error) the possession of said described real estate". This judgment, if carried into execution, must be followed by the the delivery of possession to the defendant in error, a private citizen; and result in the closing of the street and depriving the public of its use as a public highway. This, we submit, is inconsistent with, and repugnant to the public right, and so contrary to public policy that it cannot, on principle, be upheld.

City of Cincinnati vs. White, 6 Peters, 431-41-42.

That case is cited and followed by the Circuit Court in the case of Central Pacific Railroad Company vs. Benity, 5 Sawyer, 118, case No. 2551, Fed. Cases, Vol. 5, page 363, and concerning which the court said:

"On the other hand it has been held that the owner of the fee could not recover the possession from a city entitled to use land as a public square, because the actual possession could not be delivered to him. Cincinnati vs. White's Lessee, 6 Pet. (31 U. S.) 431; This case does away with the idea that the owner of the fee may recover possession of the land dedicated to a public use, subject to the easement."

In the case of Williams vs Milwaukee Industrial Association, Wis. 48. N. W., 665, plaintiff brought his action of ejectment to recover part of the block on which an exposition building was located. The block in controversy had been marked "public" on the plat which had been made and filed by the owner of the land, but it was claimed that the plat was defective, and that the land, if dedicated to a public use, had been devoted to other objects, and denying the right of plaintiff to maintain ejectment, the court said:

" But here the plaintiff seeks to recover possession of a public square which the city has a right to use consistently with the object for which it was dedicated. The city may

build a market house on it if the exposition building is not one. Now, if the plaintiff should recover possession of the square, what use could he make of it which would not be hostile to the public right therein? The public and the private right which the plaintiff would enforce seem incompatible. But he says, in effect, that the trust has been perverted, and that the square has been devoted to objects not justified or designed by the owner who made the dedication. It is possible that an adjoining lot-owner might enforce the trust, and compel the city to cease misappropriating the square. Upon that point we express no opinion. We would suppose that the attorney general, on behalf of the state, might do so were it not for the statute to which we have referred, which expressly sanctions the use which the city has made of the square. But, in any view, if we are wrong as to the effect of the plat operating as a conveyance of the title of the square, we still cannot perceive how the plaintiff would obtain any fruit or benefit from this action of ejectment. A writ of possession would be unavailing or fruitless, as it seems to us, under the circumstances. Would a court order the sheriff to pull down 46-96 undivided part of the exposition building, which the legislature has authorized to be built, maintained and used for the purpose of annual industrial expositions, and, if so, by what rule of law or principle of justice could such action be vindicated?"

And so we say here that the Supreme Court of Oklahoma has found in this case that this land in controversy was platted into a street and is and has been "thrown into the street in Grand Avenue," and that "said City of Oklahoma City had appropriated said lots to its own purposes as a street, and had appropriated the same prior to the conveyance of said tract by the United States to said Trustees; * * * That said plaintiff was not occupying said tract of ground at the time the United States conveyed the same to the defendants as Trustees, but said portion of said tract was at the time used and treated as a street of said city."

And the Supreme Court, in the Beamer case, *supra*, held:

"That the adoption and approval of such plat (meaning the plat made by the Townsite Trustees), was a dedication by the United States of the lands designated on such plats as streets, and that the interest of Beamer as an occupant was divested by such action, and he has no claims against the city or against the Trustees for a conveyance."

The question whether McMaster acquired a vested interest in the property before it was so dedicated by the plat of the Trustees cannot be determined by ejectment. If he ever owned the land, it was taken from him by the plat of the Trustees, and his only remedy and only relief is to ask compensation for the land taken, which he does not do or seek to do in this case. Certainly, under the law and under the authorities, he cannot be permitted, even if he owned or ever did own, a vested interest in the land, now and for many years a part of the streets of Oklahoma City, to obtain judgment to oust the City therefrom and to block up this street, to destroy the public highway used by the abutting lot owners and the people of the city in general; but he must revert to his action to obtain compensation for his land so taken for public use, if he ever had a vested interest therein, which, of course, can be determined when that action arises.

It is contended that McMaster, the defendant in error, acquired some interest in the tract of land in controversy by settlement and occupancy, and that the interest which he thus acquired was of such vested character that he could not be deprived thereof without just compensation, under the constitutional guarantee that private property shall not be taken for a public use without just compensation. We do not wish to be understood as conceding this point, in the least, because we believe that the doctrine announced in the case of the City of Guthrie vs. Beamer, *supra*, applies here, and under the holding of the court in that case, the defend-

ant in error here did not acquire any vested interest in the tract of land in controversy. But if the defendant in error had acquired some interest or right to this property in the first instance, we still claim that he could not maintain this action, which, in principle, is an action of ejectment against the municipality, the plaintiff in error. Prior to the commencement of this action by McMaster, the Legislature of the Territory had provided a mode of procedure, whereby a private citizen could get just compensation for the taking of his property for a public use by a municipality. In other words, the Legislature of the Territory of Oklahoma had provided a special remedy by condemnation under the power of eminent domain, and this remedy was by statutory provision extended to the property owner as well as to the municipality. Sec. 48 of Article 3 of Chapter 12, being Gen. section 393, Vol. 1, Wilson's Revised and Annotated Statutes of Oklahoma, 1903, gives to the council of cities of the first class power over streets and alleys, and provides that "all damages sustained by the citizens of the city or the owners of property therein shall be ascertained as prescribed in section 399." Section 399, which gives the city power to condemn lands outside the city for certain purposes, provides that "the condemnation of such property outside of the city limits shall be regulated in all respects as provided by law for the condemnation of property for railroad purposes." Article 9 of Chapter 18, entitled "Corporations," provides a complete scheme for the organization, construction, operation and management of railroad corporations, and provides a method, by condemnation proceedings, for acquiring the title to lands for such purposes; and the right to have the compensation assessed for property taken for such purposes by condemnation under such proceedings is extended to the property owner. The Legislature of the Territory having thus provided a mode of procedure whereby the land owner can obtain compensation for property taken for a street or public highway, the land owner is con-

fined to that remedy, to the exclusion of all other remedies; and in view of the provisions of this statute, we claim the defendant in error is confined to that remedy, and can not maintain a suit against the municipality to recover the plot of ground in controversy. Vol. 7 Ency. of Pleading and Practice, page 692, states the rule, as follows:

"The statutory remedy given to land owners for land taken for public use is, in general, exclusive of all other remedies, and not merely cumulative. The act of the condemning party being unauthorized by the statute, is not a tort, and, an appropriate remedy being provided by the statute, a common law action will not lie. This rule applies not only to the fixing of the value of the property taken, but also to the ascertainment of damages to property not taken."

In the case of Little Miami Railroad Company vs. William T. Whitacre, 8 Ohio State, page 591, the court lays down this rule in the syllabus:

"Where the legislature in the constitutional exercise of the right of eminent domain, authorizes an act, the necessary consequence of which is to injure the property of another, and at the same time prescribes the particular mode in which the damages shall be ascertained, and compensated, giving to the injured party the right to resort to the same, the person or corporation acting under such authority and within the scope thereof, is not a wrong-doer, nor liable to an action for tort, but must be proceeded against under the statute remedy."

2nd Lewis on Eminent Domain, Sec. 607, is as follows:

"When Statutory remedy is exclusive. In those states in which the law, as held by the courts, permits the occupation of property before compensation is made, it is competent for the legislature to authorize such occupation of private property, upon providing the owner with an adequate remedy whereby he can obtain just compensation to which he is entitled. In such cases, the statutory remedy is exclusive of all other remedies, and supersedes the common-law actions for interfering with the owner's possession."

The statute of the territory above referred to, and others relative to the subject, afford a complete remedy whereby the land owner can obtain full and just compensation for his property taken for the public use, and this being true, the remedy by action of ejectment, or in the nature of ejectment, for the recovery of possession, is superseded by the Statute and the owner must pursue the course pointed out by it. This is now the well established doctrine of the American courts; and applying this rule to the case at bar, we submit, the defendant in error, even if he were possessed of a vested right in the premises, cannot recover in this action; and that his sole and exclusive remedy is by the special proceedings to obtain damages under condemnation as provided by the statute.

In Kaukanna Water Power Co. vs. Green Bay & Miss Cannal Co. 142 U. S. 254 the court says:

"Where a statute for the condemnation of lands for a public use provides a definite and complete remedy for obtaining compensation, such remedy is exclusive."

SECOND—POWER TO CORRECT SURVEY OF OKLAHOMA TOWNSITE VESTED EXCLUSIVELY IN THE POLITICAL AND NOT THE JUDICIAL DEPARTMENT OF THE GOVERNMENT.

We assert finally that the Judgment of the Supreme Court of Oklahoma is erroneous because it decrees to McMaster, as an alleged occupant of the Oklahoma City townsite, a tract of land which has been surveyed and platted by the officers of the United States into a street of said townsite and city, and if this judgment is permitted to stand, it will operate to change the survey of the public lands of the United States without the sanction of the Interior De-

partment, a power which does not exist in the courts. That this land was public land of the United States under the findings of the Supreme Court of Oklahoma, there can be no question. The court found (page 66): "The evidence in this case shows that the lots in controversy were a part of a tract of land conveyed by the United States to certain trustees for townsite purposes, as shown by the patent in evidence," and the relationship of the trustees to this land also clearly appears by the following finding of the court:

"By this conveyance the land was to be held in trust by said trustees, for the occupying claimants, and such trustees were made agent for such claimants, and such lands were also held in trust *sub modo* for the Government until the rightful claimants could be established, and the manner of disposing of the surplus land ascertained."

and by the further finding of the court (page 68) it appears that these trustees "Edgar N. Sweet, Levi E. Coe and David Hammons, were trustees of the townsite of Oklahoma City, in said county, for the benefit of the actual occupants thereof under the act of Congress approved May 14, 1890."

This court has already clearly held and defined the relationship of the trustees to the government of the United States, as well as to the land entered and the claimants therefor under this act. In the case of McDaid vs. Oklahoma Territory, 150 U. S., 209-220, the court decided:

"By the scheme of this act, the title is held in trust for the occupying claimants, it is true, but also in trust *sub modo* for the government until the rightful claimants and the undisposed of or surplus lands are ascertained. The act did not contemplate that the allowance of the entry and the issue of the patent should operate to devolve the final determination of conflicting claims to lots upon these government appointees, and, until the trustees conveyed, the title did not pass beyond the control of the executive department in that regard.

"The regulation of the execution of the trust by the

Secretary covered the regulation of the matter of controversies between claimants, and also included, in addition and not by way of limitation, THE REGULATION OF THE SURVEY OF THE LAND INTO BLOCKS, STREETS, ALLEYS AND LOTS, and the assessment for purchase money, costs, compensation and expenses. The supervisory power could no more be denied in respect of the decisions of the trustees upon adverse claims than in respect of the survey and assessment."

Now that the decision of this court certainly makes it plain and clear that the Trustees held the land entered in trust *sub modo* for the government until certain things are done, and that this land is to be surveyed by these officers of the goverment "into blocks, streets, alleys and lots," and that the supervisory power over such survey is vested in the Secretary of the Interior, and not in the courts of Oklahoma Territory, and that the courts have no power to compel the Trustees to correct their plats and make lots where streets and alleys have been by them surveyed and placed, either by their own original survey or by "the approval of such survey as may already have been made by the inhabitants thereof," as the first section of this act of May 14, 1890, expressly empowered the trustees to make, under regulations to be provided by the Secretary of the Interior.

Of course if this decree made by the Oklahoma Supreme Court is affirmed, it must, of necessity, work a direct and important change in the survey of this land into lots, blocks, streets and alleys, because if McMaster is finally awarded and decreed this land, then he will be given a lot where a street was located by the people upon the townsite, as the court's finding show, and where the trustees placed the street by their survey and plat. This correction of the survey we contend the courts have no power to make.

In Knight vs. United States Land Association, 142 U. S., 161, the case was brought in ejectment, as the case here, to recover a block of land in the City of San Francisco, Cal-

ifornia, and the title to the land was the thing in controversy, as here, and that title was attempted to be acquired by the United States Land association by escaping the effect of the final and last survey which was made under the authority of the Government. The court declared the law of the case on this point in those parts of the syllabus which read:

"The power to make and correct surveys of the public lands belongs exclusively to the political department of the government, and the action of that department is unassailable in the courts, except by a direct proceeding. * * *

"The Secretary of the Interior had ample power to set aside the Stratton survey of the San Francisco pueblo lands, (although approved by the surveyor general of California, and confirmed by the Commissioner of the General Land Office, with no appeal taken,) and to order a new survey; and his action in that respect is unassailable in a collateral proceeding."

In the opinion the court says:

"It is a well settled rule of law that the power to make and correct surveys of the public lands belongs exclusively to the political department of the government, and that the action of that department, within the scope of its authority, is unassailable in the courts except by a direct proceeding."

The court, in that case, considered and defined the power given to the Secretary of the Interior to supervise the public business relating to the public lands of the United States. The court said:

"The phrase, 'under the direction of the Secretary of the Interior,' as used in these sections of the statutes, is not meaningless, but was intended as an expression in general terms of the power of the Secretary to supervise and control the extensive operations of the Land Department, of which he is the head. It means that in the important matters relating to the sale and disposition of the public domain, the surveying of private land claims and the issuing of patents thereon, and the administration of the trusts devolving

upon the government by reason of the laws of Congress or under treaty stipulations respecting the public domain, the Secretary of the Interior is the supervising agent of the government to do justice to all claimants and to preserve the rights of the people of the United States."

This townsite act of May 14, 1890, section 1, provided:

"The Secretary of the Interior shall provide regulations for the proper execution of the trust, by such trustees INCLUDING THE SURVEY OF THE LAND INTO STREETS, ALLEYS, SQUARES, BLOCKS AND LOTS WHEN NECESSARY, or the approval of such surveys as may already have been made by the inhabitants thereof."

And the grant of power there contained is identical in kind, quality and quantity with the power granted to the Secretary of the Interior under Sections 441 and 443 and 2478 of the Revised Statutes of the United States, which were construed and applied in the case of Knight vs. U. S. Land Association, and no distinction can be made in the application of this power between the cases, involving the original survey of the public lands into sections or quarters, or others involving the survey of such lands into streets, alleys, squares, blocks and lots for townsite purposes. The power is the same in either case, and can no more be superceded by action or decree of the courts in one case than in the other.

McMaster, if wronged by the action of the trustees, had ample redress by appeal to the Commissioner of the General Land Office, and then to the Secretary of the Interior, in the action of the trustees in making a survey which placed his alleged claim or lot in a street of the Oklahoma City townsite, and failing to do this, he is, by the Knight case and the McDaid case above referred to, precluded from redress in the courts.

This principle is also referred to in the dissenting opinion of Mr. Justice Pancoast in this case, in which he says (page 71):

"A settler claiming property under the United States townsite laws, before he can maintain an action in the Territorial courts to litigate his claim, must make application to the townsite trustees for a deed and if the trustees refuse to convey to him he must appeal and litigate the matters through all the brances of the Interior Department, if he fails to do this he abandons his claim whatsoever it may be."

PROCEDURE IN OKLAHOMA SUPREME COURT.

On the trial of this case in the District Court in Oklahoma County, on July 7, 1900, judgment was rendered for plaintiff McMaster (p. 47-63) and thereupon the defendant, by notice upon the journal of said court demanded a second trial of said cause as provided by statute in ejectment, which said demand is granted, and the order and judgment of the court vacated, set aside, and held for naught and a second trial is by the court ordered, and the cause continued to the next term of court.

On February 11th, 1901, McMaster, plaintiff in that cause, moved the court to vacate and hold for naught that part of the court's decree granting a second trial, because the statute under which the same was made, was void (p. 50-63).

On April 29th, 1901, that motion was sustained, and the appeal was filed in the Supreme Court of Oklahoma in this case on August 5th, 1901.

In the Supreme Court, defendant in error, filed a motion to dismiss the proceedings in error on the ground that more than one year had elapsed between the final judgment of the District Court, and the filing of the appeal in the Supreme Court of Oklahoma, and because the motion for new trial was not filed within three days allowed bythe Oklahoma Statute. (p. 55) This motion, the Supreme Court of Oklahoma overruled. (p. 57) The defendant in error may attempt to represent the questions involved in that motion, here, and since we will probably have no opportun-

ity to answer that brief, we present our suggestions now, on this point. We have two answers to make to such claims.

First: The defendant in error has, so far as we are advised, at least, made no cross-assignments of error. Therefore, this question should not be considered if presented.

Second: This is purely a question of practice and procedure in the Oklahoma Courts under the Oklahoma Civil Procedure Code and the decision of the Supreme Court of Oklahoma should be held final on this question of practice.

The case of Sweeney vs. Lomme, 22 Wallace, 208, was a proceeding on error to the Supreme Court of the Territory of Montana. The syllabus in point, reads:

"In a suit on a replevin bond given to the sheriff, where the question whether the proper party to sue is the sheriff, or the party for whose benefit the bond was given depends upon the code of practice of Montana Territory, this court will not reverse the decision of the Supreme Court of that territory on the question; that being a question on the construction of their own code."

We claim, however, if this court should consider that it should review these questions. that the proceeding in error was taken to the Supreme Court of Oklahoma within the time, that is, within the year allowed by the statutes of Oklahoma. When the District Court granted the second trial as our statute provides, it vacated the judgment rendered, and that judgment remained vacated until April 29th, 1901. During that time it is manifest that the City of Oklahoma City could not have taken an appeal to the Supreme Court of Oklahoma, because there was no judgment to appeal from. The District court had vacated the judgment, and thus the City of Oklahoma City had no judgment to complain of, and there was no judgment from which it could appeal until that judgment was re-instated by the action of the court taken on April 29, 1901. The time for taking the appeal

from the judgment, must certainly, therefore, have run from that time, and the appeal was filed in the Supreme Court of Oklahoma within one year from that date. And, for like reasons, we claim the motion for new trial was filed in time, under the statute. The statute provides: (Sec. 4198, Statutes of 1893)

"The application for a new trial must be made at the term the verdict, report or decision is rendered; and, except for the cause of newly discovered evidence, material for the party applying, which he could not, with reasonable dilligence, have discovered and produced at the trial, shall be within three days after the verdict or decision was rendered, unless unavoidably prevented."

Now, when the court, on July 7th, 1900, vacated this judgment and granted us another trial and continued the cause for the term, there was, of course, nothing to lodge a motion for a new trial against. We had already been granted a new and other trial, and it would have been useless or worse than useless to make a motion for a thing that the court had already given us.

We very respectfully ask that this court reverse the judgment of the Supreme Court of Oklahoma, and that the Court, upon the facts and the record and under the law, direct a judgment in favor of the city of Oklahoma City, and that the case of Frank McMaster against the city of Oklahoma City to recover a parcel of ground in a street of the city of Oklahoma City be dismissed.

Respectfully,

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